

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2019/00017

NAKATHIMBA AKIM

APPELLANT

v

THE STATE

RESPONDENT

**Neutral citation:** *Akim v S* (HC-NLD-CRI-APP-CAL-2019/00017) [2019] NAHCNLD 79 (8 August 2019)

**Coram:** SALIONGA J and JANUARY J

**Heard:** 18 June 2019

**Delivered:** 08 August 2019

**Flynote: Criminal Procedure** – Appeal against conviction and sentence— Irregularities committed during trial proceeding — Magistrate did not afford the appellant sufficient time to conduct his defence — Failure to explain the right of disclosure- Medical record unprocedural admitted — Court failing to inform unrepresented accused right to object J88 — Alleged irregularities committed during the trial must be decided on what is apparent from the record. Effect thereof — Circumstances of the case considered — Whether same constituted irregularities — At no stage during proceedings appellant

protested against manner the trial was conducted — Irregularities found not fundamental in the circumstances — Conviction not vitiated by irregularities.

**Criminal Procedure** —Sentence — Appeal against sentence — Role of court of Appeal —Trial court to exercise discretion in sentencing in accordance with judicial principles — Court of appeal only interfere if discretion not exercised properly or judiciously — No irregularities or misdirection on sentencing — Court of appeal reluctant to erode trial courts' discretion.

**Summary:** Appellant was convicted on a charge of assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act, Act 4 of 2003 in the Oshakati district sitting at Okahao. He was sentenced to 18 months imprisonment. The appellant is now appealing against his conviction and sentence. On appeal it was argued that several irregularities were committed by the presiding magistrate as a result the accused was not given a fair trial. In that the magistrate's failure to afford adequate time and facilities for the preparation and presentation of the appellant's defence before the commencement of and during the trial particularly the right to be defended by a legal practitioner, the failure to enquire and ensure that the appellant was provided with disclosure of the evidential material which the State intended to use, the magistrate's acceptance of the charge presented by the prosecutor without properly examining the averments therein and her failure to explain to the appellant the particular circumstance which could serve as an aggravating factor justifying the imposition of a particular severe penalty.

*Held;* that the alleged irregularities committed by the presiding magistrate, must be decided on what is apparent from the record and does not vitiate the conviction.

*Held further;* that the magistrate did not misdirect or committed irregularities with regard to sentence imposed and appeal is dismissed.

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## ORDER

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1. The appeal is dismissed.
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## JUDGMENT

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SALIONGA J (JANUARY J concurring):

### **Condonation**

[1] The appellant was convicted of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act.<sup>1</sup> He was sentenced to 18 months imprisonment. He lodged an appeal against the conviction and sentence. The appeal against conviction is directed at the manner in which the proceedings were conducted (procedurally); and the court's evaluation and findings on the facts. Mr Alexander appears for the appellant and Mr Andreas for the respondent.

[2] It is alleged that on 29 April 2018 at or near Uukwandongo the accused did wrongfully, unlawfully and maliciously assault Nakantimba Dortea Hinanane by hitting her with a stick on the body with intent to do the said complainant grievous bodily harm and the domestic relationship as defined by section 3 of the Act<sup>2</sup> was present, that of aunt and nephew.

[3] Appellant filed his notice of appeal within the prescribed time limit provided for in rule 67 of the Magistrates' courts rules and respondent equally filed the notice of intention to oppose in time. However both counsel filed the heads of arguments outside the time frame. Respondent submitted an

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<sup>1</sup> 4 of 2003

<sup>2</sup> Supra para 1

affidavit explaining the late filing. The court was satisfied with counsel's explanation and allowed counsel to address it on the merits.

[4] Appellant's appeal is based on the following grounds:

In respect of conviction:

That the presiding magistrate committed several irregularities rendering his trial unfair and breach of article 12 of the Namibian Constitution: In that

The magistrate's failure to afford adequate time and facilities for the preparation and presentation of the appellant's defence before the commencement of and during the trial particularly the right to be defended by a legal practitioner

The magistrate's failure to enquire and ensure that the appellant was provided with disclosure of the evidential material which the State intended to use

The magistrate's acceptance of the charge presented by the prosecutor without properly examining the averments therein and her failure to explain to the appellant the particular circumstance which could serve as an aggravating factor justifying the imposition of a particular severe penalty.

The magistrate's irregular admission of a purported medical report (J88) into evidence and her reliance thereon to find that the complainant suffered a fractured arm and injury on her eye.

In respect of sentence:

That the sentence imposed is startlingly inappropriate or induces a sense of shock or is such that striking disparity exists between the sentence imposed by the trial Court and that which the Court of Appeal would have imposed had it sat in first instance.

[5] It was submitted on behalf of the appellant that prior to the commencement of trial proceedings, the presiding magistrate failed to afford adequate time and facilities for the preparation and presentation of the appellant's defence and during the trial particularly the right to be defended by a legal practitioner, the failure to enquire and ensure that the appellant was provided with disclosure of the evidential material which the State intended to use against him so as to properly prepare for his defence and the magistrate's acceptance of the charge presented by the prosecutor without properly examining the averments therein and her failure to explain to the appellant the particular circumstance which could serve as an aggravating factor justifying the imposition of a particular severe penalty. These failures, it is submitted, vitiated the appellant's trial. Consequently rendered the trial unfair and were in breach of article 12 of the Namibian Constitution. Were of such proportion that it constituted an impermissible and unlawful infringement of the appellant's right to a fair trial.

[6] Counsel further submitted that it has become an entrenched legal principle in our criminal justice system that the accused's fundamental rights in terms of article 7 and 12 of the Constitution. This includes the right to have full disclosure timeously in order to allow him sufficient opportunity to prepare his reply to the charge and his defence. Further that the presiding officer has a duty to inform the unrepresented appellant of his right to apply for disclosure of the docket which duty he neglected.

[7] As authority for his submission, counsel referred this court to *S v Scholtz*<sup>3</sup> where it was stated that:

'...any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at a disadvantage by allowing the prosecution to keep relevant materials close to its chest in order to spring a trap in the process of cross examining and thereby secure a conviction cannot be said to be fair and just. Full disclosure is in accordance with article 7 and 12 of the Namibian Constitution. It would be wrong to maintain a system of justice known to be in some respects unfair

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<sup>3</sup> 1998 NR 207 (SC)

to the accused. The rights to disclose has acquired a new vigour and protection under the provisions of articles 7 and 12 of the Constitution. The right to chosen or assigned legal representation is a right of substance, not form’:

[8] *Aukalius v S*<sup>4</sup> where the well-established principle was restated that ‘the learned magistrate had a duty to inform the accused of his right to have disclosure and his failure to do so constituted an irregularity which is fundamental and warranting the setting aside of the conviction and sentence.

[9] On the other hand, Counsel for the respondent submitted that even if the appeal court finds that indeed the irregularities were committed by the learned magistrate, such irregularities do not taint the conviction. He referred this court to *Immanuel Shikunga v The State*<sup>5</sup> as authority for his submission. On the rights to legal representation counsel conceded that such rights were provided in the Constitution .However whether the failure of the accused to be afforded the opportunity to be represented results in a failure of justice is a question of fact which depends on the circumstances of each case. Counsel further submitted further that in casu, the appellant was informed of his rights on the 16 July and opted to apply for legal aid. On the 29 January 2019 the appellant indicated that he was no longer interested in applying for legal aid. Counsel thus submitted that appellant waived his right to legal representation and to misdirection committed in proceeding with the trial

[10] With regard to disclosure counsel for the respondent submitted that it is trite law that the appellant has a right to have full disclosure during trial and the record is silent on whether or not the learned magistrate did explain this right to the appellant. He further submits that sight must not be lost that the matter was not a complex one which would prejudice the appellant. It is his submission that prior to the charge being put to the appellant, the learned magistrate enquired from the appellant whether he was ready for trial and appellant indicated that he was ready to proceed.

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<sup>4</sup> unreported judgement (CA 50-2014) [2017] NAHCNLD 10 (20 February 2017)

<sup>5</sup> correct citation S v Shikunga & another 1997 NR 156

[11] The issue for determination is whether the magistrate, failed in his duty as alleged by the appellant and apart from using a formulaic pro-forma, assisted the appellant in exercising his rights.

[12] At the onset one has to distinguish *Scholtz*<sup>6</sup> and *Aukalius*<sup>7</sup> and *Kambatuku*<sup>8</sup> cases from the matter before court. In that, the appellants in all cases were charged with a more serious and complex cases. In particular Kambatuku's case, it was established that, the appellant received an acknowledgement letter from legal aid and the magistrate could have given him another postponement. That was not the case in the instant case. There is no indication throughout the trial, that the appellant could not follow the proceedings what so ever. Appellant immediately after he was sentenced consulted a lawyer to file a notice of appeal. The court cannot speculate on the nature and extent of the appellant's readiness to proceed with a trial. However this court, appreciates the fact that the learned magistrate enquired from the appellant if he was ready to proceed.

[13] According to the record, when the appellant appeared in court on 16 July 2018 he was properly informed that he had a right to get a legal representative of his choice or to apply for legal aid. The appellant opted to apply for legal aid. The matter was postponed several times for further investigation and eventually to 29 January 2019 for plea and trial and the following appears on record;

'PP: State is ready to proceed with P& T

Court: Accused person, are you ready for P&T

Accused: Yes

Court: Initially, you wanted to apply for legal aid

Accused: Yes but I am no longer interested. I will conduct my own defence.'

[14] In the circumstances of this matter, the appellant was afforded time to apply for legal aid on the first day of appearance. His failure to do so was tantamount to a waiver of his right. This has become apparent when the

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<sup>6</sup> Supra

<sup>7</sup> Supra

<sup>8</sup> Unreported (CA 48/2013)[2014] NAHCMD 41 (12 February 2014)

presiding officer enquired from him “what became of his application for legal aid” and he responded that he no longer interested. I caution myself of the duty of the magistrate to ensure that the appellant’s rights were explained but this duty is not without limit. At different stages of proceedings, the magistrate did explain the appellant’s rights which he understood as indicated on the pro-forma annexures attached. The question is, did the pro forma explanation used, fail to meet that standard and if it did, what was its impact on the trial? In my view the explanation of the rights in the pro-forma were reasonably adequate, though formulaic. I therefore do not agree with counsel for the appellant that the pro-forma used by the magistrate in explaining the appellant’s rights were not clear

[15] Strydom JP at 223 D in *S v Bruwer*<sup>9</sup> was mindful of the fact that reference in our Constitution to a fair trial forms part of “the Bill of Rights and must therefore be given a wide and liberal interpretation. However, he failed to see how it can be said, even against this background that a trial will be less fair if a person who knows that it is his right to be legally represented is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice as in most other instances where a failure of justice is alleged, is a question of fact.” I endorse the sentiments expressed. In the instant matter I am satisfied that the appellant’s right to legal representation was explained and he, waived his rights to apply for legal aid and that the magistrate rendered the necessary assistance to the appellant.

[16] It was further counsel for the appellant’s submission that the defective charge was put to the appellant, counsel, argued that the magistrate at the pleading stage was obliged to examine the charge sheet to ascertain whether the essential elements of the alleged offence have been averred with reasonable clarity and certainty and give the accused an adequate and readily intelligible exposition of the charge against him. In this regard, counsel for the appellant submitted that the State failed to prove that the assault occurred in a domestic relation in the instant case.

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<sup>9</sup> 1993 NR 219 (H)



[17] The charge against the accused is that of assault with intent to do grievous bodily harm as read with the provisions of the Combating of Domestic Violence Act. In the instant case the common law offence was proven except that the State did not prove that a domestic relationship existed. In terms of s 304(1)(c)(iv) of the the Criminal procedure Act<sup>10</sup>, this court may give such judgment or impose such sentence as the trial court ought to have given or imposed. Whereas the court below should have convicted the accused on assault with intent to do grievous bodily harm, it is now up to this court to correct the trial court's judgment and to bring it in accordance with the dictates of justice. In *S v Sethie*<sup>11</sup> Liebenberg J agreed with the concession made by the learned magistrate that the common law offence of assault with intent to do grievous bodily harm has not been substituted by statute but, it must be *read with* and merely augments the ambit or extent of the common law offence.

[18] The next issue raised by appellant's counsel was the medical reports handed into evidence by the State. Counsel argued that irregular admission of the purported medical report into evidence and her reliance thereon to find that the complainant suffered a fractured arm and injury on her eye was a serious irregularity vitiating the conviction. According to counsel appellant was not given the opportunity to object to the admissibility of the contents of the report. Further the most worrying aspect of the magistrate's conduct is the fact that she allowed the prosecutor, immediately after the appellant had pleaded and without leading any evidence or laying any basis thereof, to hand up the medial report and the magistrate simply accepted the report without enquiring from him if he understood what the document is all about.

[19] I do agree with counsel for the appellant that the manner in which the magistrate handled the medical report in admitting same into evidence is irregular. Certainly the procedure implored does not accord with the established rules of evidence and procedure. The report was produced without any basis being laid or making use of section 212 of the CPA. More so

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<sup>10</sup> Act 51 of 1977

<sup>11</sup> (CR 74/2018) [2018] NAHCMD 303 (26 September 2018)

the effect of the document was not explained to the unrepresented appellant. Such procedure is wrong and must be discouraged.

[20] Counsel submitted that the presiding officer has a duty to inform the unrepresented appellant of his right to apply for disclosure of the docket which duty he neglected. The right to have access to a police docket or the relevant part thereof is not a question which can be answered in the abstract. It is essentially a question to be answered having regard to the particular circumstances of each case.

[21] This court has to decide whether such irregularities are of such a nature that they taint the conviction.

[22] It is a well-established principle in law that not every breach of a constitutional right during criminal proceedings would result in the setting aside of the conviction. It will depend on the circumstances of each case. In *S v Shikunga*<sup>12</sup> the Chief Justice after examining the approach adopted in various jurisdictions, formulated the proper approach on constitutional breach as follows on page 170 F - 171 C and held that:

'...the test proposed by our common law was adequate in relation to both constitutional and non-constitutional irregularities committed during a trial. Where the irregularity was so fundamental that it could be said that in effect there has been no trial at all, the conviction should be set aside. However where the irregularity was of a less severe nature, then depending on the impact of the irregularity on the verdict, the conviction should either stand or an acquittal on the merits should be substituted thereof. The essential question was whether the verdict had been tainted by irregularity. Two equally compelling claims had to be balanced: the claim of society that a guilty person should be convicted, and the claim that integrity of the judicial process should be upheld. Where the irregularity was of a fundamental nature or where the irregularity, though less fundamental taints conviction, the latter interest prevail. Where, however the irregularity was not of a fundamental nature and did not taint the verdict, the former interest prevails.'

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<sup>12</sup> 1997 NR156 (SC)

[23] The said legal principal was approved in *S v Forbes and others*<sup>13</sup> where Mutambanengwe AJ stated that a violation of a constitutional right of an accused in a criminal trial does not per se constitute an irregularity. The Court must always balance the interests of the public and the interests of the accused. Where the absence of an irregularity would still have led to a conviction, such irregularity should not lead to an acquittal.

[24] Applying the dicta enunciated in *Shikunga's* case to the present facts, I am not persuaded by counsel's argument that the irregularities committed were so fundamental that it could be said that the appellant was not given a fair trial. The irregularity committed is of a less severe nature and the conviction has not been tainted by the irregularity committed. I reject counsel's argument.

### **Ad Conviction**

[25] I now turn to consider these grounds set out under the paragraph of the notice pertaining to conviction. As indicated earlier these grounds are interrelated and can be dealt with simultaneously. In considering the conviction I will rely on the heads of argument filed. This is an appeal against the conviction and sentence by the magistrate of Outapi district. Appellant in his Notice of Appeal against conviction and sentence tabulated various grounds including the irregularities in the conduct of the trial. These issues have duly been discussed and nothing further needs to be said in this regard.

[26] The grounds raised were that the state's evidence was generally riddled with material contradictions, improbabilities and inconsistencies without stating the contradiction. Save to say the magistrate ought to have rejected the witnesses' evidence of being that of a mother and daughter. He further submits the fact that the second witness did not lay a charge with the police made them to conclude that it was not stated in her statement to the police. The court is not expected to speculate on the facts.

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<sup>13</sup> 2005 NR 384(SC)

[27] Furthermore counsel argued that the magistrate's reliance on the report to make certain conclusions amounts to serious misdirection in the circumstances. That the medical report did not indicate that the injuries were consistent with the alleged assault and did not corroborate the victim's version that she was admitted in hospital and has a metal in the arm or that as a result of the injuries she would not make use of the arm.

[28] As for the remaining grounds, I do not deem it necessary to quote same in any detail, save for stating that, essentially, all are directed at the court's failure to evaluate the charge and allowing appellant to plead to a defective charge, admitting a medical report and made certain factual findings and the generally evaluation of the evidence of State witnesses.

[29] It is settled law that in criminal proceedings the prosecution must prove its case beyond reasonable doubt.

[30] Counsel for the appellant submitted that the learned magistrate committed a serious misdirection when she made a positive credibility findings in respect of the two state witnesses and that they corroborated each other. Further that the learned magistrate completely ignored the evidence relating to the surrounding circumstances of the alleged assault. He also attacked the magistrate finding on the basis of a defective charge which I had already dealt with as well as the process of admitting the medical report.

[31] With regard to the sentence imposed counsel submitted that the sentence imposed was influenced firstly by the magistrate incorrect apprehension that the offence was committed within a domestic relationship and secondly by the erroneous apprehension of the law and the fact that the state had proven that the complainant suffered severe injuries as a result of assault which findings were based on inadmissible hearsay evidence or alternatively on evidence which was based on an irregularly admitted J88.

[32] Counsel for the respondent submitted that the evidence of the two witnesses was very clear and consistent and corroborated each other in all

material aspects. In the result the learned magistrate did a proper evaluation of all the evidence placed before her and referred this court to *S v Auala*.<sup>14</sup>

[33] With regard to sentence counsel for the respondent submitted that the power of the appeal court to interfere with the sentence is discretionary but is preconditioned on the existence of a misdirection or commission of an irregularity by the trial court or where a sentence imposed is startlingly inappropriate or induce a sense of shock or was such that a striking disparity existed between the sentence imposed by the trial court and which the court of appeal would have imposed had it sat in the first instance.

[34] Counsel further submitted that the learned magistrate in assessing the sentence considered and thereby duly weighed the personal circumstance of the appellant, the crime and the interest of society and pray for the dismissal of the appeal.

[35] It is common cause that complainant was assaulted and as a result she sustained injuries. It is not in dispute that the appellant did assault the complainant. The question is whether appellant intended to cause grievous injury and whether he acted in self-defence. The law as regards the intent required by the accused when perpetrating an assault for a conviction on a charge of assault with intent to do grievous bodily harm was clearly set out in *S v Tazama*<sup>15</sup> where the court found that the offence did not require actual causing of grievous bodily harm and the essential element is the *intention* to cause serious harm. Thus, slight injury – or no injury at all – would still satisfy the elements of the offence of assault *with intent to do grievous bodily harm*.

[36] The learned magistrate in her verbatim judgement found that the two State witnesses corroborated one another and stated that the accused assaulted the complainant with a stick, kicked her all over her body and used fists on her. The court further found no justification to his actions and rejected his defence. She further found that the intention to cause grievous bodily

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<sup>14</sup> 2008 (1) NR 223 HC at page 235)

<sup>15</sup> 1992 NR 190 (HC).

harm can be seen in the manner in which the assault was carried out and the nature of the injuries.

[37] The inconsistencies in the evidence of the State witnesses as pointed by counsel are not material. It is not uncommon that witnesses, when testifying, differ from one another in minor respects, instead of relating identical versions to the court. There can be various reasons explaining this phenomenon and it does not necessarily mean that deliberate lies were told to the court. Contradictions per se do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error when considered against the totality of the evidence presented. Counsel's criticism of the complainant's evidence of injuries sustained being implausible is without substance. Complainant gave a detailed testimony of her injuries and the fact that she was hospitalised. She further testified about the metal in her body and that she is unable to use her arm. That is to me is real evidence and J88 could just be supplementary to that. One does not need a medical report to know that. She sustained injuries as a result of accused action.

[38] The court a quo in my view was correct in relying upon evidence of the complainant and her witness. The appellant placed himself on the scene. He was also implicated by the evidence of the complainant which was corroborated by the second witness. The incident happened during the day light and accused is well known by the witnesses. In the process of assault the complainant sustained an injury on the left eye and a fracture on her arm. The medical report (J88) indicates the injuries sustained by the complainant though it was admitted unprocedural. I do not agree with Mr Counsel for the appellant's submission that the medical report does not support the complainant's evidence or collate the injuries sustained.

[39] Where on appeal the trial court's factual findings and associated credibility findings have been challenged, an appeal court will not readily disturb the findings of a trial court on credibility and on questions of fact. The rationale behind this rule is that the trial court has the advantage of seeing and hearing the witnesses and being steeped in the atmosphere of the trial,

an advantage the appeal court simply does not have. Only where the trial court's conclusion is clearly wrong would the appellate court be duty bound to interfere.

### **Ad Sentence**

[40] From the judgment on sentence it is evident that the trial magistrate explained the appellant's rights to mitigation fully and accused understood as displayed on page 35 of the record. The magistrate further gave detailed reasons after she had received the notice of appeal. The reasons are sufficient to convince this court that she considered the personal circumstances, the seriousness of the offence, prevalence and the fact that the punishment must fit the offender, crime and must be fair to society as was held in *S v Zinn*<sup>16</sup>.

[41] A rule of practice in our law is punishment falls within the discretion of the trial court. As long as that discretion is judicially, properly and reasonably exercised an appellate court ought not to interfere with the sentence imposed. The principle was stated in a number of authorities but it suffices to refer to *S v Tjiho*<sup>17</sup> where Levy J held that '...a court of appeal is entitled to interfere with a sentence if, the trial court misdirected itself on the facts or on the law; when an irregularity which was material occurred during the sentence proceedings; when the trial court failed to take into account material facts or over-emphasised the importance of other facts; or when the sentence imposed is startlingly inappropriate, induces a sense of shock or there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.'

[42] In the present case, the learned magistrate properly balanced the personal circumstances of the appellants, the interest of justice as well as the interest of society. It is no doubt that the offence is serious and the appellants brutally assaulted the complainant who was hospitalized for 30 days. As a consequence of the appellants' actions, complainant suffered permanent

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<sup>16</sup> 1969 (2) SA 537 (A)

<sup>17</sup> 1991 NR 361

scars and disabilities. We are thus unable to find that a sentence of 18 months' imprisonment imposed is so manifestly excessive that no reasonable court sitting as a court of first instance would have imposed it. In the light of the above we are satisfied that the trial court in sentencing the appellant, exercised its discretion properly and there no basis in law for this court to interfere with the sentence imposed.

### **Conclusion**

[43] We were unable to find that the trial court misdirected itself in its evaluation of the evidence or in sentencing the appellant justifying any interference by the court on appeal.

[44] In the result, it is ordered:

1. The appeal is dismissed

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J T SALIONGA  
JUDGE

I agree,

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H C JANUARY  
JUDGE



## APPEARANCES

For the Appellant:           Mr V Alexander  
  Of Ellis Shilengundwa Inc., Windhoek

For the Respondent:         Mr J Andreas  
  Office of the Prosecutor-General, Oshakati