

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION,
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL- 2020/00015

In the matter between:

JOHANNES JOSEF

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Josef v S* (HC-NLD-CRI-APP-CAL-2020/00015) [2020] NAHCNLD 128 (10 September 2020)

Coram: JANUARY J and SALIONGA J

Heard: 27 August 2020

Delivered: 10 September 2020

Flynote: Criminal Procedure — Notice of appeal—Appeal against sentence — such notice should set out clearly and specifically grounds on which appeal is brought— this rule of practice is not to be ignored without good cause — unrepresented appellant not exempted — No valid notice of appeal to consider — Condonation refused and appeal struck from the roll.

Summary: This is an appeal against a sentence of 36 months imprisonment imposed on him after the appellant was convicted of fraud together with co-accused in the Magistrates Court of Outapi. The appellant was sentenced on 27 May 2019 and filed a notice of appeal on 4 June 2019 which according to the letter by the Ombudsman was not received. He then lodged an undated second notice with date stamp 27 February 2020 which was out of the time limit but was not objected. The Respondent raised a point in limine that there were no clear and specific grounds set out in the notice of appeal as required by rule 67 (1) of the Magistrates court Rules.

Held, that there were no grounds of appeal and the matter is struck from the roll.

ORDER

1. The application for condonation is refused.
 2. The appeal is struck from the roll.
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JUDGMENT

SALIONGA J (JANUARY J concurring):

[1] Appellant in this matter was convicted in the Outapi Magistrate Court on a charge of fraud and sentenced to 36 months' imprisonment. The appellant represents himself and the State is represented by Mr. Matota. The appellant now appeals against the sentence.

[2] According to the appellant, he filed a notice of appeal on 4 June 2019. There is no proof of this alleged notice of appeal. However there is a letter dated 8 January 2020 from the Ombudsman advising him to file another notice because his appeal was not received by the clerk of court. The appellant then lodged an undated notice of appeal date stamped 27 February 2020 which was out of the prescribed time limit.

[3] In his notice of appeal, the appellant merely requests the appeal court to reduce his sentence, because he is a bread winner of the family, he has five

children, a house and livestock and if he stays long in prison his property might be stolen or lost. In the heads of argument dated 12 June 2010 the appellant stated that the learned magistrate erred or misdirected by failing to impose the sentence with an option of a fine. In other words appellant submitted that a custodial sentence without an option of a fine is inappropriate.

[4] At the commencement of the hearing, Mr. Matota raised a point in limine that the Appellant's notice of appeal does not comply with rule 67 (1) of the Magistrates Court Rules. Mr Matota submitted that the notice the appellant filed contains no clear, and specific grounds upon which the appeal is based. The appellant merely restate his personal circumstances which were already considered by the court a quo. Mr Matota further submitted that an improper ground of appeal is no ground at all and thus a nullity. The appeal should be struck from the roll.

[5] This court is alive to the fact that appellant is without legal representation and that the notice of appeal filed by him should be construed generously in the light most favorable to the appellant. However the court cannot take this proposition 'too far', as to cover situations where a peremptory statutory provision has not been complied with.

[6] Rule 67 (1) of the Magistrate Court Rules provides in simple and unambiguous language that the appellant must lodge his notice of appeal in writing in which he must set out "clearly and specifically" the grounds on which the appeal is based. He must do this to enable the magistrate to know what the issues are which are to be challenged so that he can deal with them in his reasons for judgement, to enable counsel for the state to know what the issues are so that he can prepare and present informed argument in court in its deliberations. Furthermore, the court itself would like to be appraised of the grounds so that it can know what portions to concentrate on and what preparation if any it should make in order to guide and stimulate a good argument in court.¹ This legal principle was applied and approved in *S v Kakololo* 2004 NR 7 at page 8 para F-1. In my view there is no exemption given to unrepresented person when it comes to complying with a peremptory provisions.

¹ *S v Horn* 1971 (1) SA 630 C at 631.

[7] In this appeal, the appellant failed to set out clear and specific grounds in the notice of appeal, he merely restated his personal circumstances which the court a quo had considered during sentencing. This court finds that this restatement of personal circumstances does not constitute a ground of appeal and the point in limine taken by counsel appearing for the respondent is well founded. For the aforesaid reason this court further find there is no appeal and the matter should be struck from the roll.

[8] In the result:

1. The application for condonation is refused.
2. The appeal is struck from the roll.

J T SALIONGA
Judge

I agree

H C JANUARY
Judge

APPEARANCES

For The Appellant:

Mr. J Josef
Of the Oluno Correctional Facility,
Ondangwa

For The Respondent:

Mr. L Matota
Of the Office of the Prosecutor-General,
Oshakati