

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

<b>Case Title:</b> <i>Eita Manfred Awala v The State</i>	<b>Case No.:</b> HC-NLD-CRI-APP-CAL-2020/00011
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice January J et Honourable Ms Justice Salionga J	<b>Heard on:</b> 13 August 2020 <b>Delivered on:</b> 17 September 2020
<b>Neutral citation:</b> <i>Awala v S</i> (HC-NLD-CRI-APP-CAL-2020/00011) [2020] NAHCNLD 136 (17 September 2020)	
<b>IT IS ORDERED THAT:</b> 1. The application for condonation is refused; 2. The appeal is dismissed.	
<b>Reasons for order:</b> Salionga J (January J concurring);  [1] The appellant was convicted on 10 counts of fraud and one count of theft of a Standard Bank ATM card. It was alleged that on each of the 10 different occasions the	

appellant had unlawfully and falsely and with intent to defraud, given, acted and pretended to Standard Bank that he was Nicanor Amungulu and has the right to use the ATM bob card and did then and thereby means of the said false pretence induce the said Standard Bank by withdrawing money in the amount of N\$10000 to the actual loss of Nicanor Amungulu whereas in fact and in truth when he was so acting well knew that he did not have the right to withdraw and take the money.

[2] He was then sentenced to 60 months imprisonment of which 20 months are suspended for 5 years on condition he is not convicted of fraud and/or theft committed during the period of suspension. Appellant not satisfied with the sentence imposed, filed a notice of appeal on 18 December 2019 about seven months from the date he was sentenced.

[3] He is a self-actor and Ms. Petrus argued the appeal on behalf of the respondent.

[4] At the beginning of the hearing Ms Petrus raised a point *in limine* in that the appeal was filed out of time and as such the appellant ought to have satisfied this court in his application for condonation that there is a reasonable explanation for the delay and he has reasonable prospect of success. She argued that the explanation given by the appellant that he had difficulties getting accessories and finding someone to write the appeal for him were not reasonable and prayed that the application for condonation should be refused and the matter be struck from the roll.

[5] Appellant in the supporting affidavit explained that the appeal was filed out of the prescribed time limit due to lack of stationary or equipment and that he needed someone to assist him writing the appeal. In his notice of appeal dated 6 December 2019, appellant failed to indicate that there are prospect of appeal safe to state that the magistrate imposed a heavy sentence to a first time offender and requested the appeal court to reduce the sentence.

[6] In determining whether or not to grant condonation, the court will consider (a) whether

the explanation for the delay is sufficient to warrant the grant of condonation and (b) whether the litigant has prospects of success on the appeal. In casu the appellant was sentenced on 10 May 2019 and only filed the notice of appeal on 18 December 2019 about seven months late. Appellant advanced in school up to grade 12 as stated in mitigation. In my view it is unbelievable and unacceptable that the appellant was unable to write and was looking for a writer to assist him writing the appeal.

[7] With regard to the second leg of the enquiry it is trite law that sentencing essentially falls within the discretion of the trial court and that a Court of appeal will interfere only in certain circumstances. The appellant in his notice of appeal merely requests the appeal court to reduce his sentence without indicating any misdirection or irregularity committed by the trial court. From the judgement of the court a quo, the magistrate in imposing a sentence duly considered the appellant's personal circumstances inclusive of his youthfulness. The offences were pre-planned and committed over a period of 10 days. The victim in this case was the appellant's uncle and this undoubtedly justify the sentence imposed by a court a quo. I find no misdirection or irregularity committed in sentencing the appellant.

[8] For the aforesaid reasons this court finds the appellant failed to satisfy this court that, the reason for his failure to file the notice of appeal timeously was acceptable and reasonable. I am therefore inclined to follow the sentiments shared by my Brother Ndaugendapo J in *Kamuingona v State* (CC 46/2009) [2017] NAHCMD 6 (20 January 2017) where he found that... 'The court will however not grant condonation where the non-compliance with the court rules was flagrant which 'demonstrates a glaring and inexplicable disregard for the processes of the court'. Furthermore the appeal ought to be dismissed as the second leg of the test was also not satisfied.

[9] In the result:

1. The application for condonation is refused;
2. The appeal is dismissed.

<b>Judge(s) signature</b>	<b>Comments:</b>
Salionga J:	None
January J:	None
<b>Counsel:</b>	
<b>Appellants</b>	<b>Respondent</b>
Mr. E Awala Oluno Correctional Facility, Ondangwa	Ms. S Petrus Office of the Prosecutor General, Oshakati