

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2019/00033

In the matter between:

HILARIA NDIITODINO KALIMBO

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Kalimbo v S* (HC-NLD-CRI-APP-CAL-2019/00033) [2020] NAHCNLD 40 (12 March 2020)

Coram: JANUARY J *et* SALIONGA J

Heard on: 28 January 2020

Delivered on: 12 March 2020

Flynote: Appeal- Point in limine - Two notices of appeal filed- Which notice should be used by the court - Notice to withdraw the first notice of appeal filed - Second notice not served as required by law - Court rejects to uphold the second notice - Point in limine upheld.

Summary: Appellant appealed against conviction and sentence on a charge of murder. She was charged and convicted of murder and concealment of birth. Her first notice of appeal against sentence was withdrawn. She thereafter filed a second notice in which she was appealing against both conviction and sentence. Respondent objected to a second notice for the following reason. That on top of the initial notice of appeal against sentence there was no indication as to what was the state of the initial notice. In the absence of that proposition, the initial notice of appeal still stands and the second notice was a sham. This court upheld the point in limine.

ORDER

1. The point in limine is upheld;
2. The appeal is hereby struck and considered finalised.

JUDGMENT

SALIONGA J (JANUARY J concurring)

[1] The appellant was arraigned in the regional court held at Eenhana on charges of murder read with the provisions of Combating of Domestic Violence Act, 4 of 2003 and concealment of birth in contravention of section 7(1) of Ordinance 13 of 1962, as

amended. She pleaded not guilty on count one and guilty on count two. She was convicted as charged by the learned magistrate Hangalo on both counts. She was sentenced to 15 years imprisonment on count one to two hundred or three months imprisonment on count two respectively.

[2] The Appellant noted an appeal against the sentence of 15 years imprisonment. She filed her initial notice of appeal against the sentence on 20 March 2018 in person. Another notice of appeal was filed by her legal practitioner on 5 September 2019 together with a notice of withdrawal dated 19 July 2019. Condonation application and affidavit was also filed. It is on that basis a point in limine was raised.

[3] The court is now tasked to determine a point in limine raised by the Respondent which states and I quote:

‘On top of the initial notice of appeal against the sentence, the appellant filed another notice of appeal. There is no indication from the appellant as to what is the state of the initial notice of appeal’.

[4] In *Tuhafeni Kakololo v The State* 2004 NR 7 (HC) Maritz, J as he then was stated the following:

‘Rule 67(1) of the Magistrates’ Courts rules requires that convicted persons desiring to appeal under section 309 (1) of the Criminal Procedure Act, 51 of 1977, “shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based.’ (*underlined emphasis*)

[5] Maritz J further stated that given the importance of its objectives, the rule is for good reason formulated in peremptory terms. As Broome JP pointed out in *R v Hoosen*, 1953 (3) SA 823 (N) at 824 that:

'...an attorney filing such a notice assumes the *onus* of satisfying this Court, when the case comes on for hearing, that the appeal has been properly noted" and that, if the notice "is not a proper notice, all the consequences of a failure to note an appeal properly in terms of the Rules necessarily follow.' I agree and endorse the sentiments expressed.

[6] In the instant case the appellant filed a new notice of appeal on 5 September 2019. The notice of withdrawal of the initial notice of appeal dated 19 July 2019 was indeed uploaded on e-justice. Counsel for the appellant explained from the bar that the date indicated on a notice was wrong because she only got instructions from legal aid in August 2019 to represent the appellant. As if that was not enough, a second notice of appeal was not lodged with the clerk of magistrate's court of Eenhana where the matter was heard which a norm but instead it bore the registrar's stamp. Counsel in the heads of argument did not try to explain this anomalies even though same was filed a day after the respondent filed his. This was inexplicable why a notice of appeal was not lodged as required by law. These provisions were crafted in peremptory language and non-compliance has a consequence and cannot be condoned.

[7] Applying the law to the facts in this case it cannot be said the applicant complied with the rules. In our view the second notice of appeal is not properly before this court and stands to be disregarded.

[8] In the result:

1. The point in limine is upheld;
2. The appeal is hereby struck and considered finalised.

J T SALIONGA
JUDGE

I agree

H C
JANUARY JUDGE

APPEARANCES:

FOR THE APPELLANT:

M Amupolo

Of Amupolo & Co. Inc, Ongwediva

FOR THE RESPONDENT:

R Shileka

Office of the Prosecutor-General, Oshakati