

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<p><b>Case Title:</b> <i>The State v Muzundo Nomsa Rachael</i> <i>The State v Nyahwema Rumbidzai</i> <i>The State v Daniel Paulus Ndimanguluke</i></p>	<p><b>Case No.:</b> CR 51/2022 Outapi: 400/2021 Outapi: 396/2021 Outapi: A71/2021</p>
	<p><b>Division of Court:</b> Northern Local Division</p>
<p><b>Heard before:</b> Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kessler AJ</p>	<p><b>Delivered on:</b> 29 September 2022</p>
<p><b>Neutral citation:</b> <i>S v Rachael; S v Rumbidzai; S v Ndimanguluke</i> (CR 51/2022) [2022] NAHCNLD 100 (29 September 2022)</p>	
<p><b>It is hereby ordered that:</b></p> <ol style="list-style-type: none"><li>1. In respect of <i>S v Muzundo Nomsa Rachael</i> (High Court Reference No. 56/2022-Outapi Case 187/2021) the conviction on counts 1 and 2 are confirmed however the sentences are amended as follows: Count 1: A fine of N\$ 5 000 or 12 months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 29(5) of the Immigration Control Act 7 of 1993: Remaining in Namibia after the expiration of a visitors entry permit, committed during the period of suspension. Count 2: A fine of N\$ 5 000 or 12 months imprisonment suspended in total for a period of five years on condition that</li></ol>	

the accused is not convicted of contravening section 30(1) (d) of the Immigration control Act 7 of 1993: Conducting a business or carrying on a profession of occupation, committed during the period of suspension.

2. In respect of S v Nyahwema Rumbidzai (High Court Reference No. 57/2022-Outapi Case 188/2021) the convictions on counts 1 and 2 are confirmed however the sentences are amended to read as follows: Count 1: A fine of N\$ 3 000 or 12 months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 29(5) of the Immigration Control Act 7 of 1993: Remaining in Namibia after the expiration of a visitors entry permit, committed during the period of suspension. Count 2: A fine of N\$ 3 000 or 12 months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 30(1)(d) of the Immigration Control Act 7 of 1993: Conducting a business or carrying on a profession of occupation, committed during the period of suspension.
  
3. In respect of S v Daniel Paulus Ndimanguluke (High Court Reference No. 183/2021-Outapi Case 85/2021) the conviction is confirmed however the sentence is amended as follows: Three months imprisonment suspended in total for a period of three years on condition that (a) the accused is not convicted of theft committed during the period of suspension and (b) that the accused complete 105 hours of community service at Outapi Magistrate's Court from 08h00 to 17h00, starting on 23 April 2021 under the supervision of the Senior Correctional Officer Mr Petrus Kamushivulu.

**Reasons for the order:**

KESSLAU AJ (SALIONGA J concurring):

[1] These matters come before this court on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused persons were convicted on various charges before the same

magistrate in the Magistrates Court of Outapi. In all matters completely suspended sentences were imposed. The convictions are in order however similar queries were send to the magistrate regarding the formulation of the conditions of suspension in that it appeared to be vague or too wide. The magistrate, in reply, conceded that the sentences were not correctly phrased.

[3] Section 297 of the CPA allows for the suspension of sentences for a maximum period of five years pending on one or more condition. The formulation of such condition of suspension should be clear in order for an accused to know which conduct will allow for the sentence to be put into operation. The suspended condition should thus refer to the conviction of the said offense and that it should not be committed during the period of suspension (Emphasis added).

[4] It is also noted that some of the sentences were ordered to run consecutively which is adding to the confusion as the sentences were suspended in total and it will only come into operation once the condition is breached. It will hardly ever happen that both will be imposed simultaneously and thus such order serves no purpose.

[5] The principles surrounding the correct formulation of suspended sentences had been discussed numerous times in review matters and magistrates are implored to read and apply same.<sup>1</sup> The convictions appear to be in accordance with justice and will be confirmed however the sentences imposed were too vague and in some instances defective by referring to the wrong sections of legislation.

[6] In the result the following orders are made:

1. In respect of S v Muzundo Nomsa Rachael (High Court Reference No. 56/2022-Outapi Case 187/2021) the conviction on counts 1 and 2 are confirmed however the sentences are amended as follows: Count 1- A fine of N\$ 5 000 or 12 months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 29(5) of the Immigration Control Act 7 of 1993: Remaining in Namibia after the expiration of a visitors entry permit, committed during the period of suspension. Count 2- A fine of N\$ 5 000 or 12

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<sup>1</sup> S v *Afrikaner* (CR 73/2022) [2022] NAHCMD 351 (18 July 2022); S v *Damon* (CR 13/2022) [2022] NAHCMD 132 (24 March 2022); S v *Setson* (CR 31/2022) [2022] NAHCNLD 69 (6 July 2022).

months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 30(1)(d) of the Immigration control Act 7 of 1993: Conducting a business or carrying on a profession of occupation, committed during the period of suspension.

2. In respect of S v Nyahwema Rumbidzai (High Court Reference No. 57/2022-Outapi Case 188/2021) the convictions on counts 1 and 2 are confirmed however the sentences are amended to read as follows: Count 1- A fine of N\$ 3 000 or 12 months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 29(5) of the Immigration Control Act 7 of 1993: Remaining in Namibia after the expiration of a visitors entry permit, committed during the period of suspension. Count 2- A fine of N\$ 3 000 or 12 months imprisonment suspended in total for a period of five years on condition that the accused is not convicted of contravening section 30(1)(d) of the Immigration Control Act 7 of 1993: Conducting a business or carrying on a profession of occupation, committed during the period of suspension.
3. In respect of S v Daniel Paulus Ndimanguluke (High Court Reference No. 183/2021-Outapi Case 85/2021) the conviction is confirmed however the sentence is amended as follows: Three months imprisonment suspended in total for a period of three years on condition that (a) the accused is not convicted of theft committed during the period of suspension and (b) that the accused complete 105 hours of community service at Outapi Magistrate's Court from 08h00 to 17h00, starting on 23 April 2021 under the supervision of the Senior Correctional Officer Mr Petrus Kamushivulu.

Judge(s) signature	Comments:
KESSLAU AJ:	None
SALIONGA J:	None