

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

Case No: CR 7/2022

In the matter between:

THE STATE

v

KABIKA KELVIN MAIMBOLWA

(HIGH COURT REVIEW CASE NO: 25/2021)

THE STATE

v

MUONDJUKI PETRINA

(HIGH COURT REVIEW CASE NO: 20/2021)

Neutral citation: *S v Maimbolwa; S v Petrina* (CR 7/2022) [2022] NAHCNLD 20 (15 March 2022)

Coram: MUNSU AJ *et* KESSLAU AJ

Delivered: 15 MARCH 2022

REVIEW JUDGMENT

MUNSU, AJ (KESSLAU, AJ concurring):

[1] The above captured cases are review cases emanating from Outapi Magistrates Court, and have all been finalized by the same presiding officer.

[2] In both cases the accused were charged with a contravention of section 34(1) read with section 1 and 34(3) of the Immigration Control Act, Act 7 of 1993 (the Act) – failure to present oneself to the immigration officer. The accused pleaded guilty and the cases were finalized in terms of section 112(1) (b) of the Criminal Procedure Act, Act 51 of 1977.

In the *Kelvin Maimbolwa* matter, the accused was sentenced as follows:

‘N\$ 2000.00 or 6 months imprisonment which is wholly suspended for a period of 3 years on condition that accused is not convicted of any immigration related offence in terms of the Immigration Control Act, Act 7 of 1993.’

In *Muondjuki Petrina* matter, the accused was sentenced as follows:

‘N\$ 2000.00 or 6 months imprisonment which is wholly suspended for a period of 5 years in terms of section 297 CPA 51 of 1977 on condition that accused is not convicted of any immigration related offence during the suspension period.’

[3] In queries directed to the presiding officer, I enquired among others whether the charges should not have been under section 34(3) read with section 34(1) of the Act

and whether the sentences imposed were not incompetent for omitting the words ‘... committed during the period of suspension’.

[4] The learned magistrate replied as follows:

Kelvin Maimbolwa matter:

‘1. I concede to the Honourable Judge’s direction in that the charge was supposed to be contravening section 34(3) read with section 34(1) of the Immigration Control Act, Act 7 of 1993 as stated in the cited authority.

2. The sentence is incompetent as it was supposed to be read as follows: N\$ 2000.00 or 6 months imprisonment which is wholly suspended for 3 years on condition that accused is not convicted of Immigration related offence in terms of the Immigration Control Act, Act 7 of 1993 during the period of suspension.’

In *Muondjuki Petrina* matter:

‘The charge must have been under section 34(3) read with section 34(1) of the Immigration Control Act, Act 7 of 1993. I am indebted to the Honourable Judge and this will not be repeated in future taking into account the cited authority for ease reference.

I equally agree with the Honourable Judge in this regard. The sentence should have read as follows: N\$ 2000.00 or 6 months imprisonment wholly suspended for a period of 5 years in terms of section 297 CPA 51/77 on condition that accused is not convicted of any immigration related offence in terms of the Immigration Control Act, Act 7 of 1993 during the period of suspension. This would then make the sentence competent. I am indebted to the Honourable judge and will rectify it in the future.’ (sic).

[5] In *S v Nukoneka*¹ the court stated the following:

[3] Section 34(1) of the Immigration Control Act 7 of 1993 does not create an offence. It places a duty on certain persons not in possession of permit.

[4] The accused should have been charged with contravening section 34(3) of the Act which provides that;

“(3) Any person referred to in subsection (1) or who fails to comply with the provisions of that section or any person referred to in subsection (2) who fails to comply with the provisions of the last mentioned subsection or any person, so referred to, who fails on being called upon to do so by an immigration officer, them

¹ *S v Nukoneka* (CR 59/2020) [2020] NAHCNLD 155 (11 November 2020).

and there to furnish to such immigration officer the particulars determined by the Chief of Immigration to enable the board the Chief of Immigration officer, as the case may be, to consider the issuing to the said person of a permit concerned, shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.”

[6] It follows that the section under which the accused were convicted was the wrong one.² However, considering that the conduct admitted by the accused is a crime under the Act; this Court has the power to amend the charge and to confirm the conviction as there would be no prejudice to the accused.³ As such, the conviction of contravening section 34(1) will be substituted with a contravention of section 34(3) of the Act.

[7] The learned magistrate rightly conceded that the sentences imposed in both matters are incompetent as they omit words that are supposed to form part of the suspended sentence to wit ... ‘committed during the period of suspension’. It is trite that the conditions of suspension must be clear and specific as the accused must understand them and know how to behave himself in compliance thereof. The words ‘committed during the period of suspension’ makes it clear that the period of suspension is related to the commission of the crime, and not, for example, the date of the conviction of the accused.⁴

[8] In both matters, the conditions of suspension was that the accused should not be convicted of ‘any immigration related offence’. In *S v Radebe*⁵ it was held that a condition of suspension should only refer to an offence which has a *material connection to the nature and circumstances of the offence of which the accused had been convicted of* i.e. it must not be so wide that it has no nexus with the offence the accused had been convicted of. The Act creates numerous offences some of which have no connection with the offences the accused were convicted of.

² See *Marcel Olivier & another* (CR 16/2011) [2011] NAHCMD (23 February 2011).

³ *S v Nukoneka* (CR 59/2020) [2020] NAHCNLD 155 (11 November 2020); *Marcel Olivier & another* (CR 16/2011) [2011] NAHCMD (23 February 2011); *S v Babiep* 1999 NR 170 (HC).

⁴ Terblanche SS, 2007 *Guide to Sentencing in South Africa*, 2nd ed Lexis Nexis, Durban, 362.

⁵ *S v Radebe* 1973 (3) SA 940 (O).

[9] In the result, it is ordered as follows:

In S v Kelvin Maimbolwa matter:

1. The conviction on contravening section 34(1) of the Immigration Control Act 7 of 1993 is set aside and substituted with a conviction of contravening section 34(3) of the Immigration Control Act 7 of 1993: Failure to present himself to an immigration officer or officer of the Ministry at the time of entering into Namibia.
2. The sentence is substituted with the following:
N\$ 2000 or 6 months imprisonment wholly suspended for a period of 3 years on condition that the accused is not convicted of contravening section 34(3) of the Immigration Control Act 7 of 1993: Failure to present himself to an immigration officer or officer of the Ministry at the time of entering into Namibia, committed during the period of suspension.

In S v Muondjuki Petrina matter:

1. The conviction on contravening section 34(1) of the Immigration Control Act 7 of 1993 is set aside and substituted with a conviction of contravening section 34(3) of the Immigration Control Act 7 of 1993: Failure to present herself to an immigration officer or officer of the Ministry at the time of entering into Namibia, committed during the period of suspension.
2. The sentence is substituted with the following:
N\$ 2000 or 6 months imprisonment wholly suspended for a period of 5 years on condition that the accused is not convicted of contravening section 34(3) of the Immigration Control Act 7 of 1993: Failure to present herself to an immigration officer or officer of the Ministry at the time of entering into Namibia, committed during the period of suspension.

D C MUNSU
ACTING JUDGE

E E KESSLAU
ACTING JUDGE