

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Kelvin Mubasen Kandundu</i>	Case no: CR 10/2022 Tsumeb 30/2021
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 28 March 2022
Neutral citation: <i>S v Kandundu</i> (CR 10/2022) [2022] NAHCNLD 27 (28 March 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and sentence of a fine of N\$ 4 000 (Four Thousand Namibian Dollars) or in default of payment 12 (twelve) months imprisonment are confirmed.2. The part of the sentence that reads 'The accused is barred from applying for a driver's licence for a period of three months' is set aside.3. The matter is remitted back to the Magistrate who presided over the matter and in his absence, any other Magistrate, in order to re-summon the accused and to comply with the provisions of section 51 (1) or section 51 (3) of Act 22 of 1999 whichever is applicable.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring):	

[1] The matter comes before this court in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 as amended, (hereinafter referred to as the CPA).

[2] The accused appeared in the Magistrates Court in the district of Tsumeb charged with the Contravention of Section 82(5) (a) of the Road Traffic and Transport Act 22 of 1999: Driving with an excessive breath alcohol level.

[3] The accused was convicted in terms of Section 112(1)(b) of the CPA on his plea of guilty and was thereafter sentenced to: 'A fine of N\$ 4 000 (Four Thousand Namibian Dollars) or in default of payment 12 (twelve) months imprisonment. The accused is barred from applying for a driver's licence for a period of three months'.

[4] Upon perusal of the record, the reviewing Judge, Small AJ, directed the following query to the magistrate: 'In view of the recorded answers to if he was forced, influenced or threatened and promised anything in exchange for his plea of guilty how was the learned magistrate satisfied that the accused tendered his plea of guilty freely, voluntarily and without being duly influenced thereto? Should the learned Magistrate not have recorded a plea of not guilty under Section 113 of the Criminal Procedure Act 51 of 1977?'

[5] The magistrate responded that the accused in fact during questioning confirmed that he was not forced, threatened, influenced or promised anything in exchange for his plea of guilty however that the opposite was recorded by mistake. The magistrate furthermore explained that he was recently transferred to the station of Tsumeb where this particular typing system, which is new to him, is used. The magistrate apologized for not correcting the record before submitting same for review.

[6] It is clear from the majority of reviews received that some magistrates are failing to ensure the correctness of records¹. It appears that review covers sheets are certified without magistrates ensuring that the record is in order². Often there are material differences between the original record, typed record and the review cover sheet.

¹ *S v Mwilima* (CR 38 /2021) [2021] NAHCMD 221 (10 May 2021)

² *S v Immanuel* (CR 3/2021) [2021] NAHCNLD 4 (29 January 2021); *S v Vrede* (CR 8/2013 [2013] NAHCMD 34 (12 February 2013)

[7] The part of the record relevant to the query from the reviewing Judge are the following questions by the court:

'Q: Were you forced influenced or threatened to plead guilty?

A: Yes.

Q: Were you promised anything in exchange for your plea of guilty?

A: Yes.'

The next question however clarifies the above as the accused is then asked:

'Q: Are you pleading guilty out of your own free will?

A: Yes.'

The additional information received from the magistrate satisfied the query from this court³ in that it is also clear from the follow up question and the rest of the proceedings that the wrong answers recorded were a bona fide mistake⁴. The conviction appears to be in accordance with justice and is confirmed.

[8] The second part of the sentence imposed was: 'The accused is barred from applying for a driver's licence for a period of three months'. The record preceding the order reflects the following:

'Aggravation by the public prosecutor:In addition in terms of Section 51 of Act 22 of 1999 we make and application or him to be disqualification for a period of 3 months.

Crt: You may response to the application by the state?

Accd: Like I said I have to transport my grandfather around. We have to go to the farm, Windhoek to see the doctors that side.'(sic)

The undefended accused was thus rightfully invited by the Magistrate to reply to the application in terms of Section 51 brought by the State however the implications were not properly explained to him. The Magistrate then applied Section 51(3) of Act 22 of 1999 which is applicable whenever a convicted person is not in possession of a valid learners or driver's licence. *In casu* there is no indication on record whether the accused was the holder of a valid driver's license; there is however evidence from the accused on record that he is frequently driving a vehicle. Section 49 (1) of Act 22 of 1999 requires of an accused to produce any learner's or driving license at the time of the hearing and can be a convenient measure to ensure the correct application of the provisions of Section 51. The court did not request the accused to comply with Section 49 (1) of the Act and

³ Section 304(1) of the CPA

⁴ *S v Zatjirua* (CR 69/2016) [2016] NAHCMD 325 (25 October 2016)

furthermore failed to properly explain the effects of the provisions of Section 51 to the accused.

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

1. The conviction and sentence of a fine of N\$ 4 000 (Four Thousand Namibian Dollars) or in default of payment 12 (twelve) months imprisonment are confirmed.
2. The part of the sentence that reads 'The accused is barred from applying for a driver's licence for a period of three months' is set aside.
3. The matter is remitted back to the Magistrate who presided over the matter and in his absence, any other Magistrate, in order to re-summon the accused and to comply with the provisions of section 51 (1) or section 51 (3) of Act 22 of 1999 whichever is applicable.
- 4.

Judge(s) signature	Comments:
KESSLAU AJ:	
SALIONGA J:	