

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: The State v Tjikundu Vathingila	Case no: CR 21/2022 OUTAPI 346/2021
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 26 April 2022
Neutral citation: <i>S v Vathingila</i> (CR 21/2022) [2022] NAHCNLD 46 (26 April 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The convictions and sentences on counts 1 and 2 are set aside.2. The matter is remitted back to the Magistrates Court Outapi to comply with the guidelines in this judgment.3. Should the accused be convicted again the court must take into account the period served in custody when imposing sentence.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring):	

[1] The matter comes before this court on automatic review.

[2] The accused appeared in the Magistrates Court in the district of Outapi charged with one count under the Custom and Excise Act 20 of 1998 and another under the Immigration Control Act 7 of 1993. The accused plead guilty to both the charges and was convicted and sentenced accordingly. According to the clerk of court Outapi, the fines imposed were not paid and thus the accused is currently serving imprisonment.

[3] The accused indicated on his first appearance that he elects to apply for Legal Aid. The case was remanded for this purpose and on the next appearance a different Magistrate presided. The accused then indicated that he received no reply on his application for Legal Aid yet. The record reflects that the Magistrate remanded the matter for Legal Aid however deleted the reason for remand and changed it to 'remand for plea'. There is no indication on record if the accused abandoned his application or if the Magistrate made some ruling in this regard. The guilty pleas were subsequently noted by the Magistrate who initially presided at the first appearance of the accused.

[4] Upon my query regarding the above, the Magistrate conceded that 'the learned Magistrate miscarried on the accused rights'. The importance of reading a record of previous proceedings cannot be emphasized enough. It will only take a moment to read and if properly kept, contains vital information useful to all parties involved. It will furthermore avoid unnecessary queries and mistakes. In this matter the Magistrate who initially remanded the matter for Legal Aid, could have enquired and cleared the position from the accused before proceeding with the plea.

[5] Section 76 (3) (a) of the Criminal Procedure Act 51 of 1977 in no uncertain terms place a duty on the Magistrate to keep a proper record and states: 'The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof'. The right to apply for Legal Aid is a fundamental constitutional right as per Article 12 (1) (e) of the Namibian Constitution and at the core of a fair trial¹. This court cannot assume that the accused abandoned his application for Legal Aid. The conviction and sentence following from this failure cannot be confirmed to be in line with the administration of justice.

¹ See *Mwilima and Others v Government of the Republic of Namibia and Others* 2001 NR 307 (HC).

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

1. The convictions and sentences on counts 1 and 2 are set aside.
2. The matter is remitted back to the Magistrates Court Outapi to comply with the guidelines in this judgment.
3. Should the accused be convicted again the court must take into account the period served in custody when imposing sentence.

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