

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2021/00017

In the matter between:

**LIDIINIKENI LINEEKELA LISIAS**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Lisias v S* (HC-NLD-CRI-APP-CAL-2021/00017) [2022]  
NAHCNLD 53 (19 May 2022)

**Coram:** SALIONGA J *et* KESSLAU AJ

**Heard:** 25 March 2022

**Delivered:** 19 May 2022

**Flynote:** Criminal Procedure- Appeal against sentence- Application for condonation- Reason for delay and prospects of success- New grounds of appeal without amended notice of appeal. Criminal Law- Sentencing primarily at the discretion of trial court- Personal circumstances of accused, interests of society and nature of the crime considered- similar sentences considered- Individualisation of sentence.

**Summary:** Accused was convicted for murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and subsequently sentenced to twenty years imprisonment. He admitted in terms of Section 220 that he stabbed the deceased in the stomach with an arrow which caused her death. Also that the deceased was pregnant at the time of death and they were in a domestic relationship, further that he stabbed her because of an argument they had the previous night and that he had the intention to kill the deceased. His appeal against sentence only was filed out of time.

*Held:* that the appellant's explanation for the late filing of the appeal is not reasonable and there are no prospects of success;

*Held further:* that sentencing is primarily within the discretion of the trial court;

*Held further:* that the trial court correctly found that the personal circumstances of the appellant were outweighed by aggravating circumstances of the case and that this sentence does not induce a sense of shock.

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### ORDER

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1. The Respondent's point *in limine* is upheld.
2. The appeal is struck from the roll and considered finalised.

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### JUDGMENT

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KESSLAU AJ (SALIONGA J concurring):

#### Introduction

[1] The appellant was convicted in the Regional Court Outapi on a charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of

2003. The particulars of charge were that on 29 April 2017 and at Omhumbu village in the Outapi district the accused unlawfully and intentionally killed Naalokoshe Joseph by stabbing her with an arrow. The accused, assisted by counsel, initially plead not guilty however on the day of trial formal admissions were entered in terms of Section 220 stating that he admitted stabbing the deceased in the stomach with an arrow which caused her death; that the deceased was pregnant at the time of death; they were in a domestic relationship; he stabbed her because of an argument they had the previous night and that he had the intention to kill the deceased. Appellant was subsequently sentenced to twenty years imprisonment. The appellant, who is a self-actor, is appealing for a reduced sentence. The appellant furthermore filed an application for the condonation for late filing of the notice of appeal.<sup>1</sup>

#### Appellant's reason for late filing

[2] The appellant's reason for the delay in filing his notice of appeal was that the right to appeal was not explained to him by the Magistrate or his counsel after finalisation of the trial. Respondent on a point *in limine* submitted that the reason should not be accepted as reasonable and the appeal should be struck.

[3] The record of proceedings in the court a quo indicates that the learned Magistrate, after imposing sentence, said the following to counsel for the appellant: 'CRT: Ms. Nghifewa I take it that you will explain the accused's rights to appeal. Ms. Nghifewa: I will do so'.

The appellant made no attempt to confirm his allegation with a confirmatory affidavit by his erstwhile attorney and thus his reason is neither here nor there.

#### Prospects of success

[4] Turning to the second requirement for condonation *to wit* the prospect of success.<sup>2</sup>

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<sup>1</sup> Rule 67 of the Magistrate's Court act 32 of 1944 as amended

<sup>2</sup> *S v Nakapela and Another* 1997 NR 184 (HC).

[5] The appellants' grounds of appeal against the sentence imposed can be summarized as follows:

That the court a quo misdirected itself by over emphasizing the seriousness of the offense at the expense of the appellant by only paying lip service to his personal circumstances. The mitigating factors presented in the court *a quo* are then listed and the ground of appeal repeated. In the appellant's heads of argument he introduced new grounds of appeal e.g. that compensation was paid by his family on order of the traditional authority, however no amended notice of appeal was filed and as such these will not be considered.<sup>3</sup>

[6] The respondent submitted that, even if the court accepts the reason of the appellant for the late filing, there is no prospect of success on appeal for the reason that the sentence imposed rightfully reflected the gravity of the crime.

[7] It is well established in our law that sentencing is primarily at the discretion of the trial court.<sup>4</sup> This court will apply the principles in the matter of *S v Tjiho* by Levy J who stated:

'The appeal court is entitled to interfere with a sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing proceedings;
- (iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by any court of appeal.<sup>5</sup>

[8] The deceased, who undisputedly was with child at the time, became a victim of gender based violence. She died in the cruellest of ways stabbed by an arrow. Evidence in aggravation indicated that she did not pass on immediately and must have suffered immense pain during her last hours. The medical report

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<sup>3</sup> See *S v PV* 2016 (1) NR 77 (HC).

<sup>4</sup> *S v Ndikwetepo and Others* 1993 NR 319 (SC)

<sup>5</sup> *S v Tjiho* 1991 361 (HC) at 366 A-B.

indicated a 17cm deep penetrative wound to the abdomen. The deceased left this world at the estimated age of 20 years old, leaving behind her family and a young child. The crime was premeditated as the appellant admitted that he was reacting to an argument they had the previous night. The Magistrate considered in favour of the appellant, and rightfully so, the s 220 admissions made by the appellant resulting in lifting the burden of proof from the State. I however cannot help but note that these admissions were only made on the day when the State was ready to proceed and with the witnesses present at court. In mitigation, when nudged by counsel if he wants to say anything regarding the offence, the appellant did not display any remorse or contrition instead he said: ' Yes, I did not really think I will find myself in this harsh situation, now I am feeling bad that I am in this situation'.<sup>6</sup> He repeated the exact same sentiments in his heads of argument.

[9] The Regional Court Magistrate's reasoning during sentence cannot be faulted. The personal circumstances of the appellant, interest of society and the nature of the crime were considered together with the aims of punishment. The magistrate furthermore considered similar sentences imposed and endeavoured to individualize the sentence.<sup>7</sup> He also justly remarked that the personal circumstances of the appellant were outweighed by aggravating circumstances of the case.<sup>8</sup>

[10] Considering the above principles this court cannot find that the court *a quo* in sentencing the appellant misdirected itself; committed any material irregularity; overemphasized the deterrent aspect or seriousness of the crime at the expense of the accused. The sentence imposed by the trial court does not induce a sense of shock and furthermore there is no disparity from the sentence that this court would impose in similar circumstances. This court is in agreement with the Respondent that there is no prospect of success on appeal against sentence.

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<sup>6</sup> Page 28 of record of appeal.

<sup>7</sup> *S v Swartz* (CC 08/2013) [2018] NAHCMD 208 (13 July 2018); *S v Hailonga* (CC 5/2012) [2014] NAHCMD 304 (14 October 2014); *S v Khoikhoi* (CC 01/2014) [2015] NAHCMD 55 (13 March 2015); *S v Van der Westhuizen* (CC 06-2015) [2015] NAHCMD 260 (5 November 2015).

<sup>8</sup> *Iiyambo v State* (CA 68/2012) [2013] NAHCMD 42 (8 February 2013) at par [6]; *Ndaumbwa v S* (CC 11/2010) [2017] NAHCNLD 73 (31 July 2017) at par [10].

[11] In the result:

1. The Respondent's point in limine is upheld.
2. The appeal is struck from the roll and considered finalised.

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E. E. KESSLAU  
ACTING JUDGE

I agree,

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J. T. SALIONGA  
JUDGE

## Appearances

Appellant: Mr. L. L. Lisias (In Person)  
Oluno Correctional Facility

Respondent: Ms. V. T. Shigwedha  
Of the Office of the Prosecutor-General, Oshakati