

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Mawadza Alfred Dudzai</i>	Case no: CR 30/2022 Outapi: 410/2021
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice Munsu AJ <i>et</i> Honourable Mr Justice Kessler AJ	Delivered on: 27 June 2022
Neutral citation: <i>S v Dudzai</i> (CR 30/2022) [2022] NAHCNLD 65 (27 June 2022)	
It is hereby ordered that: (a) The conviction is confirmed but the sentence is set aside and substituted with the following: The accused is sentenced to a fine of N\$ 4 000 (four thousand) or, in default of payment, 12 (twelve) months' imprisonment. (b) The sentence is ante-dated to 8 March 2022.	
Reasons for the order:	
KESSLAU AJ (MUNSU AJ concurring):	
[1] The matter comes 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 person was charged at the Magistrate's Court in the district of Outapi with the contravention of Section 29(5) of the Immigration Control Act 7 of 1993 (the Act): Overstaying or remaining in Namibia after the expiration of visitors entry permit.

[3] The accused pleaded guilty to the charge, was questioned by the magistrate in terms of Section 112(1) (b) of the CPA and thereafter was convicted and sentenced to a fine of N\$ 10 000 or 12 (twelve) months imprisonment.

[4] The conviction is in order and will be confirmed however I had a concern with the sentence and queried the magistrate as follows, 'Considering the relevant penalty clause, is the learned Magistrate satisfied with the proportionality between the monetary part and the period of sentence imposed?' The magistrate replied that he is satisfied with the sentence imposed however is open to any directive.

[5] Section 29(5) of the Act reads as follows: 'Any person to whom a visitor's entry permit was issued under subsection (1) and who remains in Namibia after the expiration of the period or extended period for which, or act in conflict with the purpose for which, that permit was issued, or contravenes or fails to comply with any conditions subject to which it was issued, shall be guilty of an offence and on conviction be liable to a fine not exceeding R 12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment'

[6] The purpose of imposing the option of fine as part of sentence is to keep an accused out of prison. Once that decision is made the magistrate should consider the financial means of an accused in order to make an assessment of an appropriate fine to be imposed. The effect of an unreasonably high fine will result in direct imprisonment for an accused which in turn frustrates the purpose of imposing such fine in the first place.¹

[7] Regarding the fine to be imposed the following was stated in *S v Sithole*² : 'when it has been decided to give a convicted person the option of a fine, there should be some

¹ *S v Plaatjie* (CR 58/2020) [2020] NAHCMD 362 (18 August 2020); *S v Sakka* (CR 54/2021) [2021] NAHCMD 283 (08 June 2021).

² *S v Sithole* 1979 (2) SA 67 (A) at 69H.

purposeful inquiry into his means in order to enable the court to make a proper assessment of what an appropriate fine, in the particular circumstances, would be’.

[8] In mitigation the accused indicated *inter alia* to the court that he can afford a fine of N\$ 2 000. The State in aggravation suggested a sentence of N\$ 3 000 or nine months imprisonment. Notably the sentence suggested by the State, correlated with the ratio as provided for in the particular penalty clause, *to wit* a fourth of the allowed maximum sentence. The magistrate considered the various sentencing factors and imposed a fine of N\$ 10 000 or in default of payment thereof twelve months imprisonment. The record is silent on why the sentences suggested by the accused and State were found to be inappropriate by the magistrate.

[9] The fine imposed is not only shockingly harsh but also hugely disproportionate to the alternative term of imprisonment imposed in light of the penalty clause. The learned writer Terblanche had the following to say regarding the determining of the ratio: ‘The sentencing court cannot simply add any term of alternative imprisonment. Such a term has to be reasonable and should, ideally, not punish the offender more severely than would the fine’.³ Equally the same applies where the fine portion of the sentence is far more severe. In this regard the court in *S v Shigwele*⁴ stated: ‘When a court, in exercising its sentencing judicial discretion, considers to impose a fine, it is expected to arrive at a fine that is proportionate to the alternative term of imprisonment considered to be passed. The Legislative penalty clause and all other sentencing guidelines are useful tools which assist in arriving at a just sentence’.

[10] In *S v Mbaendavi*⁵ it was held that: ‘Over the years the courts have laid down certain guidelines where the appeal or review Court is entitled to interfere with a sentence imposed by a lower court and one such instance is where 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 the court of appeal’.

[11] In the instant matter, the accused overstayed for a considerable period of time, *to wit* 2 334 days, after the expiry of his visitors entry permit. The term of imprisonment imposed by the magistrate thus appear to be reflective of the seriousness of the offense

³ S S Terblanche *Guide to sentencing in South Africa* Lexis Nexis 2 ed at page 272.

⁴ *S v Shigwele* (CR 75/2020) [2020] NAHCMD 453 (2 October 2020).

⁵ *S v Mbaendavi* (CR 40/2016) [2016] NAHCMD 141 (12 May 2016).

however the monetary part of the sentence will be adjusted to correlate with the penalty provision.

[12] In the result the following order is made:

(a) The conviction is confirmed but the sentence is set aside and substituted with the following:

The accused is sentenced to a fine of N\$ 4 000 (four thousand) or, in default of payment, 12 (twelve) months' imprisonment.

(b) The sentence is ante-dated to 8 March 2022.

1.

Judge(s) signature	Comments:
KESSLAU AJ:	None
MUNSU AJ:	None