

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2021/00035

In the matter between:

IITANA JOHANNES

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Johannes v S* (HC-NLD-CRI-APP-CAL-2021/00035) [2022]
NAHCNLD 89 (16 September 2022)

Coram: MUNSU AJ *et* KESSLAU AJ

Heard: 13 September 2022

Delivered: 16 September 2022

Flynote: Criminal Appeal - procedure – power of attorney not filed - Once a nullity it remains a nullity and cannot be resurrected or revived, neither by condonation of the non-compliance nor by the amendment of the defective notice – appeal record in disarray- non-compliance with rule 118(4) - strict compliance with the rules required – appeal struck from the roll.

Summary: The appellant was convicted in the Magistrates Court of Ondangwa on a charge of attempted murder, he was undefended at the time, and was sentenced to twelve months imprisonment. The appeal is only against his conviction. After his sentence he instructed counsel who filed a notice of appeal within time but however failed to simultaneously file a power of attorney. The case record was not certified correct by the trial magistrate, it is not in a chronological order and impossible to adjudicate. Respondent raised two points in limine pointing out the defects in the notice of appeal and the disarray state of the record.

Held: that a legal practitioner on behalf of a convicted person shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorizing him to note an appeal and to act on behalf of the convicted person;

Held also: that the duty rests on the magistrate, with the assistance of the clerk of court, to rectify the record by reconstructing same or indicating the failure to do so;

Held further: that the matter is struck from the roll.

ORDER

1. The Respondent's points *in limine* are upheld.
2. The appeal is struck from the roll.
3. The bail is extended on condition the appellant withdraws the defective notice of appeal and files a fresh notice of appeal accompanied by an application for the condonation of the late filing of the fresh notice of appeal in compliance with the provisions of Rule 67(1) of the Magistrates Court Rules together with the required power of attorney on or before 7 October 2022.
4. In the event of compliance with paragraph 3 the bail is further extended until such time that the appeal is finalised.

5. In the event of non-compliance with paragraph 3 the bail of appellant is cancelled, refunded and appellant to report at Oluno Correctional Facility on 10 October 2022 at 08h00 to start serving his sentence.
6. The trial Magistrate, alternatively Divisional Magistrate, is directed to ensure compliance with High Court Rules 118(4) and 118(5), to properly arrange the record of proceedings, reconstruct the record if need be and issue a certificate of accuracy or indicate the reason for non-compliance.

JUDGMENT

KESSLAU AJ (MUNSU AJ concurring):

Introduction

[1] The appellant was convicted in the Magistrates Court of Ondangwa on a charge of attempted murder. On 9 March 2021 the learned Magistrate sentenced the appellant, who was undefended at the time, to twelve months imprisonment.

[2] The appellant thereafter instructed counsel who filed a notice of appeal within time however failed to simultaneously file a power of attorney. Appellant with the assistance of his current counsel was granted bail pending appeal and has been on bail ever since. The appeal appears to be against conviction only.

[3] The record is before this court without a certificate of accuracy from the trial magistrate who indicated that she could not sign same as the record is incomplete.

[4] The record is not arranged in chronological order, making it difficult to adjudicate the matter.

Points *in limine*

[5] Respondent submitted two points *in limine*, firstly, that the appellant did not comply with Rule 67 (1) of the Magistrate's Court rules in that the power of attorney was not filed simultaneously with the notice of appeal; secondly that there is no proper appeal before court as the appeal record is in a disorganized state, not prepared in accordance with law in that the appellant failed to comply with Rule 118(4) of this court's Rules. Respondent submitted that the appeal was prematurely placed on the roll and request for an order to remove it.

[6] On the first point, counsel for the appellant submitted that, this court condoned the non-compliance of the absence of a power of attorney by remanding the matter on previous occasions whilst it was already established that the power of attorney was not filed. It was further argued that it should not be regarded as a nullity as that is not what 'the Legislature intended' and that it should be condoned. However there was no application for condonation filed by counsel.

[7] On the second point *in limine*, counsel blamed the trial magistrate and clerk of court. He submitted that the record is incomplete and for that reason the conviction and sentence should be set aside. It is undisputed that the record is in disarray but it cannot be said or concluded that it is incomplete.

[8] Rule 67 (1) of the Magistrate's Court rules states that: 'A convicted person desiring to appeal under section 103 (1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based: Provided that if such appeal is noted by a legal practitioner on behalf of a convicted person he shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorizing him to note an appeal and to act on behalf of the convicted person.' (Emphasis added) The effect of which is that the appeal was noted whilst unauthorized by the appellant.

[9] In the matter of *Beyer v S¹* the following was said regarding non-compliance:

'Once a nullity it remains a nullity and cannot be resurrected or revived, neither by condonation of the non-compliance nor by amendment of the defective notice (See *Molebatsi v Federated Timbers (Pty) Ltd* 1996 (3) SA 92 (BSC)). The correct procedure to be followed in such an instance is to withdraw the appeal and file a fresh notice in terms of Rule 67

¹ *Beyer v State* (CA 134/2013) [2014] NAHCMD 172 (03 June 2014).

together with a condonation application in respect of the late filing of the new notice of appeal.'

[10] In *S v Kavari*² it was established that Rule 67 (1) of the magistrate's court rules requires strict compliance and requires that a power of attorney be filed together with a notice of appeal, clearly indicating the mandate of the legal practitioner. The court concluded that 'the appeal was not properly noted by the appellant nor by someone duly authorized by him in the prescribed manner' and was struck from the roll.

[11] Rule 118 (4) of this court's rules reads as follows:

'Where the appellant is not represented by a legal practitioner the ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court rests with the magistrate against whose decision the appeal has been entered and in the absence of such magistrate the responsibility rests with the control magistrate or divisional magistrate with jurisdiction over that magistrates' court.'

Furthermore Rule 118 (5) states that:

'The registrar may not allocate an appeal to a judge unless a certificate to the effect that all copies of the record on appeal are in all respects properly before the court has been issued by the magistrate referred to in subrule (4), but where the appellant is the State or is represented by a legal practitioner the responsibility rests with the appellant.' (Emphasis added)

[12] The magistrate, in her reasons provided, states that she cannot sign the certificate of accuracy as 'some of the proceedings that were recorded do not form part of this court record'.³ In such an instance the duty rests on the magistrate, with the assistance of the clerk of court, to rectify the record by reconstructing same or indicating the failure to do so.

[13] Applying the above principles to the current case, it is clear that the appeal is not properly before this court.

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

² *S v Kavari* 2011(2) NR 403.

³ Page 239 of the record of appeal.

1. The Respondent's points *in limine* are upheld.
2. The appeal is struck from the roll.
3. The bail is extended on condition the appellant withdraws the defective notice of appeal and files a fresh notice of appeal accompanied by an application for the condonation of the late filing of the fresh notice of appeal in compliance with the provisions of Rule 67(1) of the Magistrates Court Rules together with the required power of attorney on or before 7 October 2022.
4. In the event of compliance with paragraph 3 the bail is further extended until such time that the appeal is finalised.
5. In the event of non-compliance with paragraph 3 the bail of appellant is cancelled, refunded and appellant to report at Oluno Correctional Facility on 10 October 2022 at 08h00 to start serving his sentence.
6. The trial Magistrate, alternatively Divisional Magistrate, is directed to ensure compliance with High Court Rules 118(4) and 118(5), to properly arrange the record of proceedings, reconstruct the record if need be and issue a certificate of accuracy or indicate the reason for non-compliance.

E E KESSLAU
ACTING JUDGE

I agree,

D C MUNSU
ACTING JUDGE

APPEARANCES

APPELLANT: Mr. A. Shapumba
Shapumba & Associates Inc., Ondangwa

RESPONDENT: Ms. M. Nghiyoonanye
Of the Office of the Prosecutor-General, Oshakati