

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
REVIEW JUDGMENT

Case Title: <i>The State v Pangeiko Shelifika Haikali</i>	Case No.: CR 11/2023
High Court NLD Review No.: 407/2022	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 07 March 2023
Neutral citation: <i>S v Haikali</i> (CR 11/2023) [2023] NAHCNLD 22 (07 March 2023)	
The order: <ol style="list-style-type: none">1. The conviction of contravention of section 29 (1) is set aside and substituted with a conviction of the contravening section 29(5) of the Immigration Control Act, Act 7 of 1993.2. The sentence is confirmed however amended to: A fine of N\$ 2 000 (Two Thousand Namibian Dollars) or 12 (Twelve) months imprisonment of which N\$ 1 000 (One Thousand Namibian Dollars) or 6 (six) months are suspended for a period of five years on the condition that the accused is not convicted of Contravening section 29 (5) of the Immigration Control Act 7 of 1993: Remaining in Namibia after expiration of visitor's entry	

permit, committed during the period of suspension.

Reasons for order:

Salionga J (Kessler, AJ concurring):

[1] This is a review matter in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).

[2] The accused was charged and convicted for contravening section 29 (1) read with sections 1 and 8 of the Immigration Control Act, Act 7 of 1993- Remaining in Namibia after expiration of visitor's entry permit.

[3] Accused was sentenced to two thousand Namibian Dollars (N\$2000-00) or 12 Months (twelve) imprisonment of which one thousand Namibian Dollars (N\$1000-00) or 6 (six) months imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of contravening section 29 (1) of Act 7 of 1993 committed during the period of suspension. The sentence is in order and will be confirmed. It is the erroneous reference to the sub-section in respect of the charge as that of contravening section 29(1) of Act 7 of 1993, (which provision does not constitute an offence) that the reviewing court has a qualm with. The Magistrate conceded to a query in this regard.

[4] Section 304(2)(a) of the CPA provides that if it appears that the proceedings are not in accordance with justice or doubt exists thereto a query shall be send to the trial magistrate to give reasons for the conviction or for the sentence. This requirement may be dispensed with when the concerned judge is of the opinion that the conviction and sentence are clearly not in accordance with justice and the convicted person may be prejudiced.

[5] According to the charge sheet the accused is a foreign national who allegedly remained in Namibia after the expiration of his visitor's visa and he continued to remain in Namibia for 4 years and 2 months after the expiration date of his visitor's entry permit.

[6] The charge erroneously referred to this offense being a contravention of 29(1) of the Immigration Control Act, Act 7 of 1993, whereas the correct provision for this offense is that of a contravening 29(5) of the Immigration Control Act, Act 7 of 1993. The sentiments expressed by the court in *S v Egumbu*¹ that magistrates must verify that the statutory references are consistent to the charge label and particulars, finds application to this matter. Therefore Magistrates are once again cautioned to always verify these statutory references.

[7] Furthermore in *S v Hauwanga*² it was held that ‘... if the body of the charge is clear and unambiguous in its description of the act alleged against the accused ... the attaching of a wrong label to the offence or an error made in quoting the charge, the statute or statutory regulation alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom.’ In the matter before me, no prejudice will be suffered if the section is corrected to reflect the correct section contravened.

[8] Consequently, the order is as follows:

1. The conviction of contravention of section 29 (1) is set aside and substituted with a conviction of the contravening section 29(5) of the Immigration Control Act, Act 7 of 1993.
2. The sentence is confirmed however amended to: A fine of N\$ 2 000 (Two Thousand Namibian Dollars) or 12 (Twelve) months imprisonment of which N\$ 1 000 (One Thousand Namibian Dollars) or 6 (six) months are suspended for a period of five years on the condition that the accused is not convicted of Contravening section 29 (5) of the Immigration Control Act 7 of 1993: Remaining in Namibia after expiration of visitor’s entry permit, committed during the period of suspension.

¹(CR/ 10/2019 [2019] NAHCMD 11 (24 January 2019).

²(CR 11/2013) [2013] NAHCNLD 23 (22 April 2013).

J T SALIONGA JUDGE	E E KESSLAU ACTING JUDGE