

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Edgar Malundo	Case No: CR 43/2024
High Court NLD Review No.: 226/2024	Division of Court: Northern Local Division
Heard before: Salionga J et Kessler J	Delivered on: 7 October 2024
Neutral citation: <i>S v Malundo</i> (CR 43/2024) [2024] NAHCNLD 111 (7 October 2024)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction is confirmed.2. The sentence is set aside and substituted with the following: The accused is sentenced to a fine of N\$ 500 or 30 days' imprisonment.	
Reasons for the order: KESSLAU J (SALIONGA J concurring)	
<p>[1] The matter, from the Magistrate's court of Ohangwena, was submitted for review in terms of ss 302-304 of the Criminal Procedure Act 51 of 1977 (the CPA), as amended.</p> <p>[2] The accused pleaded guilty to a charge of contravening s 29(5) of the Immigration Control Act 7 of 1993 (the Act). After questioning by the magistrate in terms of s 112 (1)</p>	

(b) of the CPA, the accused was convicted and sentenced. The conviction is in order and will be confirmed, however, the record reflected two different sentences imposed.

[3] According to the record the accused was sentenced to a fine of N\$1200 or 5 months imprisonment and additionally three years imprisonment suspended in total for a period of 5 years on the usual conditions. Whereas according to the review cover sheet, as well as the NAMCIS computer generated order, the accused was sentenced to a fine of N\$500 or 5 months imprisonment and additionally three years imprisonment suspended in total for a period of 5 years on the usual conditions.

[4] A query was forwarded to the magistrate to firstly, explain the different sentences recorded and, secondly, to remark on the additional suspended sentence of three years which appeared harsh in the light of the fact that the accused overstayed for a period of only 20 days.

[5] The magistrate replied that the sentence imposed as per the record (a fine of N\$1200) was the correct one. However, that she erroneously entered a wrong sentence (a fine of N\$500) into the computer when creating the NAMCIS order. That is not all, it appears that the accused then paid the N\$500 and returned to Angola. I pause here to note that once a sentence is entered into the computer system, that is the sentence that will reflect at the clerk of the court if they access the case to receive payment. The clerk would have been able to notice the error if she had the physical charge sheet with her and read it before payment was processed. As for the suspended part of the sentence, the magistrate submitted that the sentence is proportional and request it to be confirmed.

[6] Section 29(5) of the Act states that:

'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 acts in conflict with the purpose for which, that permit was issued, or contravenes or fails to comply with any condition subject to which it was issued, shall be guilty of an offence and on conviction be liable to a fine not exceeding R12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment . . .' (my emphasis)

[7] The sentence imposed, consisted of 5 months as an alternative to a fine as well as 3 years suspended in total. The penalty clause as referenced above allows for a

maximum penalty of three years only and therefore this sentence is incompetent in that regard. Additionally, the charge sheet alleged that the accused overstayed from 16 to 18 March 2024 which amounted to two days 'overstaying' and not the 20 days as indicated on the charge sheet.

[8] Considering the facts that the sentence imposed exceeded the maximum penalty provided for, as well as that the days were calculated in excess of what they really were, the sentence appears shockingly inappropriate.

[8] Considering the above, the following orders are made:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following: The accused is sentenced to a fine of N\$ 500 or 30 days' imprisonment.

Judge(s) signature	Comments:
KESSLAU J:	None
SALIONGA J:	None