

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Andreas Shilimela and another</i>	CASE NO: CR 01/2024
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kesslau J	Delivered on: 17 January 2024
Neutral citation: <i>S v Shilimela</i> (CR 01/2024) [2024] NAHCNLD 02 (17 January 2024)	
It is hereby ordered that: <ol style="list-style-type: none">1. The trial proceedings held on 11 November 2022 and 29 November 2022 are set aside.2. The matter is remitted to the Magistrate's Court Oshakati to proceed <i>de novo</i> before a different magistrate.	
Reasons for the order:	
KESSLAU J (SALIONGA J concurring)	
[1] This matter from the Magistrate's court of Oshakati was forwarded by the Divisional Magistrate responsible for that district with the request to set aside irregular proceedings in terms of s 20(1)(c) of the High Court Act 16 of 1990.	
[2] The two accused were charged with stock theft read with the provisions of the	

Stock Theft Act 12 of 1990 as amended, however accused 1 absconded before the charge could be put. The plea and trial proceeded in his absence against accused 2 only who was subsequently convicted and sentenced during October 2016 by the late Magistrate Namweya.

[3] The record makes no mention of section 159 of the CPA which allows for criminal proceedings to take place in the absence of an accused and in particular s 159 (2) which states that:

'If two or more accused appear jointly at criminal proceedings and . . . (b) any of the accused is absent from the proceedings . . . without leave of the court, the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may . . . (bb) direct that the proceedings be proceeded with in the absence of the accused concerned.'

[4] Additionally s 159 (3) of the CPA states that:

'Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.'

[5] If the above procedure in terms of s 159 of the CPA was followed, a possible solution might have been for the matter to proceed in terms of s 160 of the CPA which provides for the procedure to be followed should an absent accused re-join a matter.

[6] In this matter some six years passed since the finalization of the case against accused 2 when during January 2022 accused 1 was re-arrested and appeared before another Magistrate on the same charge and on the finalized record. Accused 1 pleaded to the charge on 11 November 2022 after which various witnesses were called to testify. These included witnesses whose evidence was previously recorded and included allegations made against accused 1 who was at the time absent. The record furthermore included the final submissions and judgment in which the involvement of accused 1 was

implicated.

[7] Considering that the first magistrate who was responsible for the initial record keeping was no longer available, and the fact that accused 1 did not plea to the charge at the time when he absconded, the best would've been to separate proceedings and start *de novo*. The new Magistrate had extensive access and possibly knowledge of the facts prior to the trial. This resulted in hampering his need for impartiality with the possible prejudice to the accused's right to a fair trial.

[8] Considering the irregularity in the proceedings as discussed above, the following orders are made:

1. The trial proceedings held on 11 November 2022 and 29 November 2022 are set aside.
2. The matter is remitted to the Magistrate's Court Oshakati to proceed *de novo* before a different magistrate.

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