



CASE NO.: CA 49/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

UAHORINUA THOM

APPELLANT

and

THE STATE

RESPONDENT

CORAM: LIEBENBERG J & TOMMASI J

Heard on: 21 October 2011

Delivered on: 28 October 2011

APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against the conviction of the appellant in the district court of Opuwo and the sentence imposed by the regional court sitting at Opuwo.

[2] The appellant and a co-accused were charged with theft taking into considerations the provisions of section 11(1)(a), 1, 14 and 17 of the Stock Theft Act, 12 of 1990 as amended. The appellant and his co-accused pleaded not guilty but were convicted as charged. Subsequent to the conviction, the accused were committed to the regional court for sentence. Both the appellant and his co-accused were sentenced to twenty (20) years imprisonment of which fifteen (15) years were suspended for five years on condition that the accused are not convicted of stock theft read with the Stock Theft Act, 12 of 1990 as amended, committed during the period of suspension.

[3] The appellant appeared in person and the State was represented by Mr Lisulu. The Respondent applied for condonation of the late filing of the Heads of Argument. The appellant did not oppose the application for condonation. The Heads of Argument was served on the appellant in time for him to peruse it and the explanation advanced for this omission was reasonable. The Court therefore granted condonation for the late filing of the Heads of Argument.

[4] The notice of appeal was filed outside the time period prescribed by rule 67 of the Magistrate's Court Rules. The appeal was noted approximately 7 months out of time. The appellant explained that he is a layman and that he has never had any formal education. He was assisted by a fellow inmate who advised him to obtain a copy of the record of proceedings. He received the proceedings after a month. He confirms that he was informed of his right of appeal. Mr Shileka indicated that the respondent considered the explanation tendered by the appellant to be reasonable in view of the fact that the appellant was not informed of the provisions of rule 67 (2) of the Magistrate's Court Rules which provides that, if the appellant is unable, owing to illiteracy or physical defect, to write out the notice of appeal, the clerk of the court shall, upon his request, do so.

[5] Mr Shileka however argued that condonation should only be granted herein if there are reasonable prospects of success and in his view, there are reasonable prospects that the appellant may succeed on appeal against sentence; but there are no prospects of success in respect of the conviction. For reasons stated hereunder it would not be necessary for the Court to consider the application for condonation by the appellant.

[6] Counsel for respondent however, in his heads of argument, pointed out that the notice of appeal does not comply with rule 67(1) of the Magistrate's Court Rules in that it does not clearly and specifically set out the grounds of appeal against conviction; and it does not contain any grounds of appeal against sentence. The appellant made oral submissions that the sentence imposed was "*too long.*"

[7] The appellant's notice of appeal, quoted verbatim reads as follow:

"STATUS OF THE CASE The case is a stock theft case and I was sentenced for a. five (5) years imprisonment sentence. My part at the case they are implicating me off producing a permit and act for someone to sell a cattle.

The grounds of my request of notice of my appeal

A.

I need your honourable the case to be reviewed. I am not happy and satisfied with the outcome of the court for sentencing me upon the case I did not commit it all. That's why I request for the review of my case. I don't know anything upon the matter. The guy who sold the cattle is from our village he used to come and buy cattles and go with them. I just know the guy but is not my family or in same business. In this case in the court I asked where is the permit I gave to the buyer for that person who sold the cattle they are implicating me as an agent while there is no evidence and they failed to produce any paper as proof in the court that's why I give notice of appeal against the case and the sentence for review.

B

In the court the buyer or the witness I asked him in court where is the paper I gave you as a permit. He answered saying the paper got lost he don't have that paper. And the court also asked the man whether he know us me and the guy who sold the cattle. He replied like this me 'Uahahonina Thom' I only gave him a permit only. And another guy he sold the cattle. This is the issue I am against at all.

C.

The day I was sentenced I was on bail. Then the prosecutor and the complainant they hold as meeting afternoon before the court proceedings and hey agreed upon to sentence me with the magistrate saying the questions I am asking are not effective.

Honourable the matter is not fair at all so can you please let the case be reviewed brought back to court and all people must produce the evidence so that it can be fair.

So your honourable I left the issue in your hands and looking forward to your response.

Dated at Oluno Rehabilitation Centre Ondangwa, on this 4th of September 2009.”
(sic)

[8] The above quoted notice does not make any sense at all. It is all too clear that the person who drafted the notice of appeal was not conversant in English and that he/she does not have any knowledge of the provisions of rule 67(1) of the Magistrate's Court Rules. This is but one of many appeals where notices of appeal are drafted by fellow inmates. In *S v KAKOLOLO 2004 NR 7 (HC)* the need for clear and specific grounds was spelled out. The Court held that the noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall and cautioned that any relaxation of these rules would cause the administration of justice to degenerate into disorder. Although this was stated in a case where the appellant was represented, the same result would follow if this Court would relax the rules in cases where the appellants are unrepresented. The above quoted notice cannot by any standards be considered a proper notice of appeal and it furthermore does not contain any grounds of appeal against sentence. There is thus no proper appeal before this Court.

[9] The magistrates need to inform illiterate appellants that they may approach the clerk of the court to assist them with the drafting of the notice of appeal in order to avoid appellants turning to fellow inmates who do more harm than good. This Court cannot afford to relax the rules and allow for the administration of justice to fall into disrepute.

[10] In the result this matter is struck off the roll.

Tommasi J

I agree

Liebenberg J