



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO.: CA 15/2013

ELIAS IZAK

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Izack v The State (CA 15/2013)[2013] NAHCMD 207 (23 July 2013)*

Coram: DAMASEB,JP *et* NDAUENDAPO,J

Heard on: 22 July 2013

Delivered on: 23 July 2013

Fly note: Criminal appeal - Appeal against sentence of periodical imprisonment for failing to comply with a maintenance court order to pay maintenance for a minor child.

Summary: The appellant who had previously been ordered to pay maintenance in the amount of N\$ 150 per month in respect of the maintenance of his minor son failed to comply with the court order and was, upon own plea of guilty, sentenced to

1000 hours of community service. The appellant now appeals against sentence on the ground that the sentence is shockingly inappropriate. The appeal succeeds.

Held, that failure to pay maintenance constitutes domestic violence in terms of Combating of Domestic Violence Act, 4 of 2003; such failure not a peccadillo to be visited with light sentences;

Held, Appeal court will not lightly interfere with a sentence intended to ensure that a father makes sure he takes responsibility to pay maintenance seriously.

Held, further, Court satisfied that periodical imprisonment was justified in the circumstances but that the trial court ought to have elicited further information about the accused's working schedule. Appeal succeeds and matter remitted to the Magistrates' court to consider the sentencing afresh.

ORDER

1. The appeal on sentence succeeds;
2. The sentence of periodical imprisonment imposed by the maintenance court is set aside;
3. The matter is referred back to the magistrate who imposed the sentence to consider the sentence afresh and to then deal with the matter according to law.

JUDGMENT

DAMASEB, JP (NDAUENDAPO, J CONCURRING):

[1] This an appeal from the maintenance court for the Windhoek district. The appellant (whom I shall hereafter refer to as the 'accused') was properly convicted on his own plea of guilty for failing to pay maintenance in respect of his minor child.

After his conviction, the magistrate imposed a sentence of 1000 hours of periodical imprisonment on Fridays at 18H00 until Sunday at 16H00; and, in addition, ordered the accused to pay the arrear maintenance of N\$ 12 900 in the amount of N\$300 per month with interest at the rate of 20 % per annum. The effect of the sentence is that he reports for incarceration on a Friday at 18h00 and is then released at 16H00 on Sunday.

[2] At the plea proceeding, the magistrate first explained to the accused that the law allows him the defence of 'no means', being the inability to pay and then asked him why he did not pay maintenance. The accused's answer was startling: He initially stated that it was through human error that he did not pay, but upon further questioning said that that he really did not have any reason for not paying.

[3] In his reasons for sentencing, the magistrate stated that failure by fathers to pay maintenance is very prevalent and has become a serious problem in our society. He added that those most detrimentally affected by this failure are the children for whose benefit maintenance orders are granted.

[4] The accused comes to this court on appeal, claiming that the sentence imposed on him was shockingly severe. He says that the magistrate ought to have imposed a fine in preference to periodical imprisonment, considering that he is a first offender who pleaded guilty.

Brief history

[5] The accused was initially charged for his failure to pay maintenance and appeared before a maintenance court on 8 July 2003. After a postponement, the inquiry took place on 15 August 2003. At that hearing he agreed to pay maintenance in the amount of N\$150 per month. An order was made for him to pay that amount on or before the 7th of every month. It was an order he was never to obey. He was then charged with contravening s 39(1) of the Maintenance Act, 9 of 2003 for accumulating unpaid arrears totalling N\$12 900 spanning the period January 2004 to September 2012. Section 39(1) states that any person who disobeys a court order by failing to make a particular payment in accordance with a maintenance order commits an offence and is liable to a fine not exceeding N\$4000, to imprisonment

not exceeding 12 months or to periodical imprisonment.¹ The magistrate also ordered him to pay the N\$12 900 in monthly instalments of 300 per month as he was entitled to do in terms of s 33 of the Maintenance Act.

The magistrates reasoning considered

[6] The accused's case before this court is that the magistrate erred in not imposing a fine. The magistrate exercised a discretion. He could have imposed a fine, a prison term of up to 12 months, impose periodical imprisonment of 100 hours or more. He chose the latter option and in so doing exercised a discretion. Sentencing is pre-eminently a matter for the trier of fact and a court of appeal will not lightly interfere with a sentence imposed by the trial court unless that court misdirected itself in the sentencing procedure; failed to take relevant factors into consideration or otherwise, the sentence is shockingly severe. The court *a quo* correctly took into account the neglect of children by fathers and the effect that has on children.

[7] The accused is not a man who had difficulty raising money to pay for the maintenance. He just chose not to do so, while knowing there was a court order obliging him to pay. He was completely unperturbed by the consequence this had on his child. The accused stated to the magistrate that the minor child was then 15 years old, meaning by the time the order was made for him to pay maintenance that child was 7 years old. The child now has only about 7 years before reaching the age of majority.

[8] Considering that the court order requiring accused to pay maintenance took effect on 1 September 2003, he only made payments for three months and ceased payment. He had therefore not paid maintenance for the child for a staggering period of eight years. What is more, the amount he was ordered to pay was very small in my view and probably counts for nothing in today's money value. A maintenance order is for the benefit of a child and not the custodian parent.

[9] It is important that fathers realise that the tide has turned against those who neglect their children; and that this court will not readily interfere with trial courts'

¹ In accordance with s 285 of the Criminal procedure Act, 51 of 1977.

sentences against those who are found guilty of the malpractice. The Combating of Domestic Violence Act² defines³ domestic abuse to, amongst others, include:

‘the unreasonable deprivation of any economic or financial resources to which the complainant or a family member or dependant of the complainant is entitled under any law, requires out of necessity or has a reasonable expectation of use ... ’

[10] A child is in a domestic relationship with its biological father in terms of s 3⁴ of the Combating of Domestic Violence Act.

[11] It must be clear therefore that failure to pay maintenance for a child is not a peccadillo to be visited with a slap on the wrist – even for first offenders. Economic abuse is a species of domestic violence as the Combating of Domestic Violence Act stipulates. As this court said in *S v Gaweseb*⁵:

‘The purpose of maintenance orders is to help children with day-to-day necessities. If the sentence to be imposed is one which makes sure that an errant parent does not default again and/ or one which seeks to recover arrear payments, it must be given serious and careful consideration, based, of course, on the facts of each case...’⁶

[12] The intent clearly behind the sentence imposed by the magistrate was two fold:

- (i) to on the one hand ensure that he remains employed to earn an income from which to pay maintenance, and
- (ii) to send a clear message, by imposing periodical imprisonment, that failure to pay maintenance will not be counteracted by the courts.

[13] I must agree with Mr Uanivi’s contention in argument, conceded by the state, that given that the accused was unrepresented at his trial, the magistrate ought to have elicited more information to establish if imposing periodical imprisonment would not in the circumstances have the contrary effect. Although the court can take judicial notice that an employee such as the accused does not work on Sundays, it cannot take judicial notice that he does not work on Saturdays until at least the lunch hour.

² Act 4 of 2003.

³ Section 2(1) (c).

⁴ Subsection (1) (d).

⁵ 2007 (2) NR 600.

⁶ At 603, para 14F.

Had the magistrate elicited more information in that regard, it is possible that the accused works, on the very least, on Saturdays until the lunch hour. In that case, the court might either not have imposed periodical imprisonment, or might have fashioned its order to meet the circumstances of the case. That failure constitutes a material misdirection.

[14] We feel this is an appropriate case to remit the matter to the court *a quo* to consider the sentence afresh in the light of this judgment. We wish to make clear that our reversal of the sentence imposed is in no way a disapproval of the imposition of periodical imprisonment but is only intended to ensure that one of the key objects intended by the sentence is not defeated. The reversal also does not affect the magistrate's order in terms of s 33 of the Maintenance Act.

[15] In the premises, we make the following order:

1. The appeal on sentence succeeds;
2. The sentence of periodical imprisonment imposed by the maintenance court is set aside;
3. The matter is referred back to the magistrate who imposed the sentence to consider the sentence afresh and to then deal with the matter according to law.

P T DAMASEB

Judge President

N NDAUENDAPO

Judge

APPEARANCE:

APPELLANT

V UANIVI

OF

UANIVI LAW CHAMBERS

RESPONDENT

C N ESTERHUIZEN

OF

OFFICE OF THE PROSECUTOR GENERAL