

REPUBLIC OF NAMIBIA



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

Case no: CA 12/2013

In the matter between:

**PATRICK LONDENI
ELIFAS HAUKONGO**

**1ST APPELLANT
2ND APPELLANT**

and

THE STATE

RESPONDENT

Neutral citation: *Londen v The State* (CA 12/2013) [2013] NAHCMD 210 (12 July 2013)

Coram: UEITELE, J and UNENGU, AJ

Heard: 12 July 2013

Delivered: 12 July 2013

Flynote: Criminal Procedure – appeal – notice of appeal – filed outside the time limit of 14 days – Magistrate Court Rule, Rule 67 (1) read with Criminal Procedure Act section 309 (2) of Act 51 of 1977 – failure to seek condonation – appeal struck from the roll.

Summary: The appellants appeared in the Regional court sitting at Mungunda Street, Windhoek facing charges of robbery with aggravating circumstances, contravening section 2 of Act 12/1999 as amended –i.e. theft of motor vehicle and attempted murder. The appellants pleaded not guilty but were found guilty as charged. On 30 July 2012, they were each sentenced to 7 years imprisonment with 2 years suspended on the first count, 10 years imprisonment on the second count and 3 years imprisonment on the third count.

Held that in terms of section 309 (2) of Act 51 of 1977, the court of appeal can condone an applicant's failure to timeously file his notice of appeal. This can be done if the applicant provides an explanation in an affidavit which is acceptable to the court as to why he was unable to file his notice of appeal within the prescribed time limits.

Held that the first appellant has not applied for condonation for the late filing of his appeal, he has also not tendered an explanation as to why his appeal is out of time, that the first appellant's appeal is not properly before this Court.

Held that second appellant has not filed a notice of appeal and has no locus standi before this Court.

That the appeal in respect of first and second appellant is struck from the roll.

ORDER

The appeal is struck from the roll.

APPEAL JUDGMENT

UNENGU AJ (UEITELE J CONCURRING)

[1] The appellants appeared in the Regional court sitting at Mungunda Street, Windhoek facing charges of robbery with aggravating circumstances, contravening section 2 of Act 12/1999 as amended i.e. theft of motor vehicle and attempted murder. The appellants pleaded not guilty but were found guilty as charged. On 30 July 2012, they were each sentenced to 7 years imprisonment with 2 years suspended on the first count, 10 years imprisonment on the second count and 3 years imprisonment on the third count.

[2] First appellant filed a notice of appeal against conviction and sentence on 14 September 2012. On 4 July 2013, the second appellant filed a supporting affidavit in an application for condonation, without stating what must be condoned.

[3] The second appellant claims that his name did not appear on the notice of set down for the hearing of the appeal and that the notice filed by first appellant includes him as well in paragraph 5 of the document titled "Applicant's Supporting Affidavit in Re Condonation Application" filed with the registrar on 4 June 2013. He further wrote another letter filed with the registrar on 7 June 2013 wherein he says in paragraph 1 that he filed his notice of appeal separately with first appellant.

[4] Ms Ndlovu, who represented the State in this appeal, filed comprehensive heads of argument and raised points *in limine* that the first appellant was sentenced on 30 July 2012, but has filed his notice of appeal with the clerk of the court on 14 September 2013 which is outside the time limit of 14 days as prescribed by the Rules of the Court¹. She submitted that there was no notice of appeal by the second appellant before this Court. She stated that the second appellant claims that the notice filed by first appellant includes him as well in paragraph 5 of the document titled "Applicant's Supporting

¹ The Magistrate Court Rules, Rule 67 (1) read with section 309 (1) of the Criminal Procedure Act 51 of 1977; Nakale v The State Case no SA 04/2010 at 6 para 7.

Affidavit in Re Condonation Application” filed with the registrar on 4 June 2013. She submitted that the wording of the notice of appeal refers only to the first appellant. There is nothing in the notice indicating that there was just an omission of the second appellant’s name. Second appellant also wrote another letter filed with the registrar on 7 June 2013 wherein he says in paragraph 1 that he filed his notice of appeal separately with first appellant. She submitted that the second appellant has not filed a notice of appeal and has no locus standi before this Court.

[5] The first appellant has not applied for condonation for the late filing of his appeal, he has also not tendered an explanation as to why his appeal is out of time², she submitted that the first appellant’s appeal is not properly before this Court and Ms Ndlovu prayed that it be struck from the roll.

[6] The application for condonation by the second appellant appears to be in respect of the omission of his name in the first appellant’s notice of his appeal. The second appellant is not applying for condonation for the late noting of appeal. There is nothing before this Court entitling second appellant to be heard. Ms Ndlovu prayed that the matter be struck from the roll for both appellants.

[7] The Magistrate Court Rules, Rule 67 (1) requires that convicted persons desiring to appeal under section 309 (1) of the Criminal Procedure Act 51 of 1977

...shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law on which the appeal is based...

[8] In terms of section 309 (2) of Act 51 of 1977, the court of appeal can condone an applicant’s failure to timeously file his notice of appeal. This can be done if the applicant provides an explanation which is acceptable to the court as to why he was unable to file his notice of appeal within the prescribed time limits. Meanwhile, Mr Ipumbu who

² S v Abraham Ruhumba CA 103/2003 an unreported judgment delivered on 24 February 2004; Kalenga Iyambo v The State case number CA 165/2008 an unreported judgment delivered on 19 October 200 at 5.

defended one of the appellants during the trial in the court below sought permission from Court to say something on behalf of the appellants – however, permission was refused because Legal Aid did not appoint him yet.

[9] The Court agrees with the State's submissions in respect of first appellant that the first appellant has not applied for condonation for the late filing of his appeal. He has also not tendered an explanation as to why his appeal is out of time, that the first appellant's appeal is not properly before this Court and that it be truck from the roll.

[10] The Court further agrees with the State's submissions in respect of second appellant that the second appellant has not filed a notice of appeal, therefore, has no *locus standi* before this Court and that it be truck from the roll.

[11] In the result the following order is made:

The appeal is struck from the roll.

Unengu
Acting Judge

SFI Ueitele
Judge

APPEARANCES

FIRST APPELLANT: In Person

SECOND APPELLANT: In Person

RESPONDENT: E N Ndlovu
Of Office of the Prosecutor-General