



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 127/2013

In the matter between:

HIDIMBWASHA REINHOLD RELITO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Relito v State* (CA 127/2013) [2014] NAHCMD 64 (14 February 2014)

Coram: HOFF J and SIBOLEKA J

Heard: 14 February 2014

Delivered: 14 February 2014 (Ex tempore)

Judg. made available: 21 February 2014

ORDER

- (a) The application for condonation is refused

 - (b) The appeal is struck from the roll.
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JUDGMENT

HOFF J (SIBOLEKA J concurring):

[1] The appellant in this matter was arraigned in the Magistrate Court, district of Rundu on a charge of assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act, Act 4 of 2003. The appellant was convicted by the court *a quo* and was sentenced to three years imprisonment.

[2] The appellant now appeals against the sentence. At the inception of this appeal Mr Lutibezi who appears on behalf of the respondent, in this matter raised a point *in limine* namely that the appellant in view of his failure to comply with the provisions of Rule 67(1) of the Magistrates' Court's Rules must first seek condonation from this court for his late filing of the notice of appeal. Now if one has to regard to the date when this application for the condonation of the late filing was filed, namely the 24th of September 2013 as well as the date when the appellant was sentenced in the Magistrate Court on the 5th of June 2013 then it is clear that the filing of the application for condonation is more than three months out of time.

[3] In the supporting affidavit the appellant provided the following reasons why the notice of intention to appeal was filed late: he stated that as a lay man he did not have any knowledge as to how to file that appeal, to whom it must go, when the notice of appeal must be filed and the days within in which such a notice of appeal must be filed.

[4] The counsel appearing on behalf of the State referred the court to an Annexure D which forms part of the record where the review and appeal rights of the appellant had been explained by the Magistrate at the end of the court proceedings. In respect of his rights of appeal it appears from this document that appellant was informed that if he was not satisfied with the conviction or the sentence then he must file a notice of appeal within 14 days of the date, meaning the day on which he had been sentenced, with the clerk of the court which notice has to include the grounds of appeal. It also appears from Annexure D that the appellant was informed that if the notice of appeal is filed out of time, that is after 14 days, that the appellant then should apply for condonation for the late filing of his notice of appeal.

[5] It further appears that he was informed that such an application for condonation has to be under oath, that is on affidavit and that such an application for condonation has to contain an explanation for the delay, namely why his notice of appeal is out of time and also has to contain that there are prospects of success on appeal. It is apparent from this document that the appellant was then asked whether he understood what was explained and he answered in the affirmative. He was also asked whether there is anything else that should be explained to him and he answered in the negative. This document was then thereafter signed by the appellant.

[6] In any application for condonation it is required of an appellant to give a reasonable and satisfactory explanation for his or her delay in filing the notice of appeal and such explanation must also be *bona fide*, meaning in good faith. There is ample authority that if the appellant fails in providing this satisfactory explanation, the court may irrespective of the prospects of success exercise its discretion in not granting such condonation. Ms Sauls appearing *amicus curiae*, for which I must express the gratitude of the court, submitted that the court should exercise its discretion in favor of granting condonation since not do so would be an injustice. She further stated that it is evident from the document in support of the condonation application that the appellant stated there was no one who could assist him and that the court should take that into account, in considering the application for condonation of the late filing of the notice of appeal.

[7] I must say that at this stage in reply I agree with Mr Lutibezi who appears on behalf of the respondent in this matter that the reference to lack of assistance is

rather vague and there is no indication in which way he was not assisted. It is trite law that an appellant must in an application for condonation provide the court with the necessary detail and must be very specific as to the reasons why the notice of appeal could not have been filed within time. If one has regard to the reasons provided by the appellant in the document in support of his condonation application, it is apparent that what is stated there contradicts what the court has informed him and which is reflected in annexure D.

[8] If one has regard to this contradiction then in our view it is clear that the appellant in this matter did not take this court in his confidence. The appellant was not very frank with the court and as was stated in the matter of *Nashapi v S* (CC 02/2004) [2013] NAHCMD delivered by my brother Cheda J and referred to by counsel appearing on behalf of the respondent, that in an application for condonation the court will not sympathize with an untruthful applicant, and secondly that applicant bears the onus of providing a reasonable and satisfactory explanation.

[9] Now the appellant in this matter in our view did not make a full disclosure of the circumstance under which he alleges he was unable to comply with Rule 67 (1) of the Rules of the Magistrates Court. I say this and I have reason to add that this court has in the past been more lenient to appellants who are lay persons and has never required the strict compliance with the form within which an explanation must be provided, although there must be some substance in the explanation from which the court may infer the reasons why the appellant was not able to file the notice timeously. We are of the view that in this particular application for condonation the appellant was not *bona fide* and in these circumstances this court cannot exercise its discretion in favor of condoning the non-compliance with Rule 67(1) of the Magistrate's Court Act.

[10] In the result the following orders are made:

- (a) The application for condonation is refused.
- (b) The appeal is struck from the roll.

E P B HOFF Judge

A SIBOLEKA
Judge

APPEARANCES

APPELLANT:

D Sauls
Sauls & Co. Law Chambers, Windhoek,
Amicus curiae

RESPONDENT:

C Lutibezi
Office of the Prosecutor-General, Windhoek