

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPLICATION FOR LEAVE TO APPEAL**

APPEAL JUDGMENT

Case no: CC 46/2009

In the matter between:

KAHIJAMBUA KAMUINGONA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kamuingona v State* (CC 46/2009) [2017] NAHCMD 6 (20 January 2017)

Coram: NDAUENDAPO J

Heard:

Delivered: 20 January 2017

Flynote: Criminal law – Application for condonation for the late filing of the application for leave to appeal against the conviction – No prospects of success on appeal – application dismissed

Summary: The applicant/appellant failed to satisfy this court that, the reason for his failure to file the application for leave timeously was acceptable and reasonable. Furthermore, the court is not satisfied that there are prospects of success on appeal. The application for leave to appeal to the Supreme Court is thus dismissed.

ORDER

The application for leave to appeal to the Supreme Court against the applicant/appellant's conviction is dismissed.

JUDGMENT

NDAUENDAPO J:

[1] This is an application for leave to appeal to the Supreme Court against the conviction of the applicant/appellant in this court on four counts of rape on 15th August 2013. The application for leave to appeal was filed out of time hence, the applicant/appellant has also filed together with his application for leave to appeal, his application for condonation for the late filing of the application for leave to appeal.

[2] In the criminal proceedings which gave rise to this application for leave to appeal, the applicant/appellant stood trial with three other accused persons on several charges of rape. The applicant/appellant was the third accused in those proceedings. He was convicted of four counts of rape. During those proceedings, the appellant/applicant was represented by Mr. Uirab under the instruction of the Directorate of Legal Aid. Mr. Uirab again represents him in these proceedings. Ms. Esterhuizen appeared on behalf of the respondent.

[3] Appellant now appeals against convictions on the following grounds:

1. The court erred in law and/or fact with its finding that the complainant was a credible witness.
2. The court erred in law and/or fact in its failure to treat the evidence of the complainant with caution because she was a single witness.
3. The court erred in law and/or fact in its failure to consider alternatively by giving insufficient weight alternatively by paying mere lip service, to the numerous contradictions and inconsistencies in the testimony of the complainant.
4. The court erred in law and/or fact with its conclusion that the contradictions, inconsistencies and improbabilities contained in the version of the complainant were not material. Furthermore, the court erred in not properly applying and considering the laws relating to how courts ought to deal with evidence that is contradictory, inconsistent and improbable.
5. The court erred in law and/or fact by failing to take into account alternatively, giving insufficient weight to the improbabilities in the complainant's version of events regarding the evening of the alleged rape.
6. The court erred in its finding that the appellant raped the complainant.
7. The court erred in law and/or fact by accepting that the recordings and findings made in the J88 medical reports relating to the complainant and the four (4) accused persons were correct, whereas Dr. Zeko clearly made errors in his reports. For example in respect of accused 1 the doctor concluded that the 'injuries fit the time and circumstances of the alleged incident' however in court he could not explain which injuries he was referring to.

8. The court erred in law and/or fact by accepting the conclusions of Dr. Zeko in all J88 reports that 'the injuries fit with the time and circumstances of the alleged incident.'
9. The court erred in law and/or fact by accepting the evidence adduced by Dr. Zeko that the appellant's penis colour looked different from normal whereas the doctor never examined the appellant before to be acquainted with the normal colour of his penis. It was on this basis that the doctor concluded in the appellant's J88 medical report that his injuries fit with the time and circumstances of the offence.
10. The court erred in law and/or fact with its finding that the complainant's evidence was corroborated by Dr. Zeko whereas the medical examinations were only carried out five days after the alleged rape incidents, particularly considering that the doctor testified that one would not expect that much tenderness after five days.
11. The court erred in law and/or fact with its finding that the version by the complainant that she was thrown to the ground in the toilet was corroborated by the doctor who observed some bruises on her back. In this regard the court completely failed to take into consideration, that: firstly, the examination was carried out after five days with the possibility that the injuries may have been caused elsewhere and secondly, accused 4 did testify that he had sexual intercourse with the complainant in the toilet whilst she was laying on her back against the floor.
12. The court erred in law and/or fact by ignoring alternatively, giving insufficient weight to the fact that the J88 medical report of the complainant did not corroborate the totality of the evidence as tendered by the complainant.

13. The court erred in law and/or fact by accepting that Dr. Zeko was a credible witness.
14. The court erred in law and/or fact with its finding that the evidence of the complainant was materially corroborated by the rest of the State witnesses (including Dr. Zeko). This is based on the following:
 - 14.1 Ms. Tuvatee Tjivau, the 2nd State witness, materially contradicted the evidence of the complainant, for example the complainant informed her that she was only raped by accused 1 in the toilet.
 - 14.2 Ms. Uaukua Kangononduezu, the 5th State witness, testified that the complainant gave her different explanations relating to her injuries.
 - 14.3 Ms. Esnath Kuaumi, the 6th State witness, testified that the complainant informed her that she was raped by four boys both in the toilet and again in the hostel.
 - 14.4 Ms. Nicola Kazondendu, the 8th State witness, testified that she was not with the complainant when the latter met accused 1 and 2 at the school toilet and accused 3 did not threaten complainant with a knife when they met and that she voluntarily went with him to watch television.
15. The court erred in law and/or fact by rejecting the evidence of Nicola Kazondendu as improbable and furthermore in its finding that this witness “was less than candid when she testified”, without giving a factual or legal basis for its finding.
16. The court erred in law and/or fact in completely rejecting the evidence of the appellant as false.

17. The court erred in law and/or fact with its conclusion that it was highly improbable that the complainant would demand sex from accused 2 in the boy's hostel.
18. The court erred in law and/or fact with its finding that it was highly improbable that the complainant would first have sex with accused 4 in the school toilet and proceed to have sex with accused 2 in the boy's hostel.
19. The court erred in law and/or fact with its finding that accused 1 made certain admissions to Mr. Theofilus Nguzu, the 7th State witness, thereby accepting the latter's evidence in this respect. Such admissions were not substantiated by Ms. Tjivau, the complainant and all four accused, all of whom were present during the interrogation and testified in court. The court furthermore, disregarded the possibility that the witness whilst being honest may have made a mistake due to the time lapse.
20. The court erred in law and/or fact by completely disregarding and/or ignoring and/or giving insufficient weight and/or paying mere lip service to the evidence elicited from all State witnesses during cross examination thereby only considering their evidence in chief.
21. The court erred in law and/or fact with its conclusion that the State has proven its case beyond reasonable doubt and in convicting the appellant.'

ISSUES

[4] The court has to determine whether, to condone the late filing of the application for leave to appeal. If it so condones, the court would then have to determine whether or not leave to appeal should be granted.

APPLICATION FOR CONDONATION

BACKGROUND

[5] The appellant/applicant was convicted of four counts of contravening section 2 (2)(a) read with sections 1,2,3,4,5,6 and 7 of the combating of Rape Act 8 of 2000. The appellant was then sentenced to an effective prison term of seven years on 28 March 2014. Subsequent to the convictions and sentences, the appellant/applicant filed an application for leave to appeal on 17 April 2014 on both the convictions and the sentences. The leave to appeal was set down for 28 July 2014. On 28 July 2014 when this matter appeared before this court, Mr. Uirab, counsel for the appellant/applicant was not present when the case was called and the court ordered that the matter be “removed from the roll”. By a letter dated 15 April 2015, Mr Uirab requested the Registrar of this court to place the matter back on the roll and to provide a new date and a notice of set down for the hearing. The Registrar subsequently set the application for leave to appeal down for hearing on 3 August 2015. On 3 August 2015, the matter was postponed to 17 August 2015 for Mr. Uirab’s response to Ms. Esterhuizen’s submissions in respect of the filing of the condonation application. On 17 August 2015, the matter was struck from the roll. On 6 October 2015, the lawyer again filed an application for leave to appeal against the conviction only and a condonation application in respect of the late filing of the application for leave to appeal. On 7 December, the matter was postponed to 1 February 2016 for submissions. On 1 February 2016, the matter was postponed for the ruling.

[6] Section 316 of the *Criminal Procedure Act* 51 of 1977, provides that:

‘An accused convicted of any offence before the high Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation on good cause be allowed, [emphasis] apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as

an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.’

[7] According to the application for condonation, the reason for the delay in making the application for leave to appeal was because the appellant’s/applicant’s legal practitioner had incorrectly interpreted the fourteen days in section 316 quoted above to mean court days, whereas in fact they refer to calendar days. It is further submitted on behalf of the appellant/applicant that the delay was not due to a fault or delay on the part of the appellant. That, being a lay person, the appellant/applicant relied on the advice he received from his legal practitioner with regard to procedure and processes. It is further submitted that, had ‘days’ in section 316 above, had meant court days, then the first application for leave to appeal would have been timeous. That the delay was merely of six days and that the non-compliance with section 316 of Act, 51 of 1977 was not deliberate nor intentional. It is trite that an applicant seeking ‘condonation must provide sufficient reasons and give all information to enable the court to decide the reasons advanced for the delay and whether same are reasonable and acceptable’, the court will also consider whether or not there are prospects of success on the merits. A litigant who has failed to comply with the rules of the court bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation and such condonation application must be launched without further delay. In order to determine whether or not to grant condonation, the court will consider (a) whether the explanation for the delay is sufficient to warrant the grant of condonation and (b) whether the litigant has prospects of success on the merits. The court will however not grant condonation where the non-compliance with the court rules was flagrant which ‘demonstrates a glaring and inexplicable disregard for the processes of the court’

[8] In *S v Kashire*¹, it was held that, ‘days’ in section 316 Act 51 of 1977 must be computed with reference to section 4 of the Interpretation Act 33 of 1957. The court thus

¹ *S v Kashire* 1978 (4) SA 166 (SWA).

interpreted 'days' in section 316 of Act 51 of 1977 as inclusive of Saturday, Sundays and public holidays, but excluding the first day and including the last.

[9] The appellant/applicant deposed to an affidavit wherein he sought to explain the delay for the lodging of the notice of appeal. The appellant gave reasons for the late filing of the notice of appeal in paragraph 6 and 7 of the affidavit. It is submitted that this evidence amounts to hearsay as it was not confirmed under oath by the appellant's/applicant's legal practitioner. Appellant/Applicant was represented by Mr. Uirab during the trial and he had not deemed it necessary to make any affidavit under oath confirming or supporting the correctness of the contents of the affidavit.

[10] In the case of *S v Cloete*² the court endorsed the sentiments expressed by the learned Deputy Chief Justice in *Katjaimo v Katjaimo and Others*³, the learned Judge said the following in relation to applications for condonation:

"Legal Practitioners should not take it for granted that the court will grant applications for postponement and condonation as a matter of course. The fate of such an application is in the discretion of the court... To take a relaxed approach to these matters is to do one's client a great disservice."

[11] When considering an application for leave to appeal, the Court must consider whether there are reasonable prospects of success on appeal.

[12] In *S v Nowaseb*⁴ Parker AJ, had this to say concerning applications for leave to appeal:

'It has been Stated in a long line of cases that in an application of this kind, the applicant must satisfy the Court that he has a reasonable prospect of success on appeal (see, e.g. Rex v Nxumalo 1939 AD 580; Rex v Ngubane and others 1945 AD 185; Rex v Ramanka 1948 (4) SA

² *S v Cloete* CA 49/2015 NAHCMD 248, 14 October 2015.

³ *Katjaimo v Katjaimo and Others* at paragraph 31.

⁴ *S v Nowaseb* 2007 (2) NR 640 at 640F – 641A.

928 (O); *Rex v Baloi* 1949 (1) SA 523 (A); *Rex v Chinn Moodley* 1949 (1) SA 703 (D); *Rex v Vally Mahomend* 1949 (1) SA 683 (D & CLD); *Rex v Kuzwayo* 1949 (3) SA 761 (A); *R v Muller* 1957 (4) SA 642 (A); *The State v Naidoo* 1962 (2) SA 625 (A); *S v Cooper and Others* 1977 (3) SA 475 (T); *S v Sikosana* 1980 (4) SA 559 (A). *The first ten sample of cases adumbrated above were decided before the coming into operation of the new Criminal Procedure Act, 1977 (Act 51 of 1977) (CPA), but the test remains unchanged. (Sikosana, supra, at 562D). Thus, an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial judge (or, as in the present case, the appellant judge) must disabuse his or her mind of the fact the he or she has no reasonable doubt. The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view (Cooper and Others, supra, at 481E; Sikosana, supra, at 562H; Muller, supra, at 645E-F). But, it must be remembered that ‘the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.’*

‘Application for leave to appeal has been dealt with extensively by this honorable court. Time and again this honorable court has emphasized that an application for leave to appeal under section 316 (1) of the Criminal Procedure Act 51 of 1977 should be allowed if the court is satisfied that the accused has a reasonable prospect on appeal. These applications are not granted on compassionate ground, to console the accused or simply afford them a further opportunity to ventilate their arguments and, to obtain judgment in a court of appeal. S v Nangombe 1991 (1) SA Cr 315 (NM) at 352B-C.’

[13] Having regard to the above, I am not satisfied that an acceptable and reasonable explanation was proffered for failing to file the application for leave timeously. In any event, there are no prospects of success on appeal. I now turn to the merits of the appeal.

Grounds 1 to 6

[14] Most of these grounds overlap. The appellant complained about the findings of the court that the complainant was credible, that her evidence was not treated with

caution, that the court paid lip service or failed to consider the contradictions, inconsistencies and improbabilities in the testimony of the complainant and that the court erred in its finding that the appellant raped the complainant. The court was alive to the fact that the complainant was a single witness and that her evidence had to be treated with caution. The court also carefully considered the contradictions, inconsistencies and improbabilities in the evidence adduced before it. In this regard, the court referred to the case of *Albertus Hanekom v The State*⁵, where the Supreme Court said the following: *'Before evaluation of the evidence of the various witnesses mention must also be made of the fact that not every contradiction or discrepancy in the evidence of a witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance and their bearing on other parts of the witness evidence'*

Having considered the totality of the evidence, the court was satisfied that the guilt of the appellant was proved beyond a reasonable doubt.

There are no merits in these grounds.

Grounds 7 and 8

[15] Counsel for the respondent correctly submitted that the fact that the doctor made an error with regard to the entries in the J88 in relation to the accused is not fatal to the State's case as there was direct and corroborated evidence of the complainant. The doctor also explained that he completed the J88 after the accused left and not contemporaneously and he made an honest mistake. In *S v Oosthuisen*⁶ the court held that 'not every error made by the witness affects his credibility. . .' These grounds are also meritless

Ground 9

⁵ *Albertus Hanekom v The State*, Case No. SA 4(A) 2010 delivered on 14 May 2010.

⁶ *S v Oosthuisen* 1982 (3) SA 571 TPD at 576.

[16] The doctor testified that he was an experienced doctor who was dealing with rape cases on a regular basis, including examination of the accused on a regular basis, he was familiar with the look of a normal penis and he gave an expert opinion about the colour of a normal penis. The court did therefore not err to accept the evidence of the doctor in that regard. The ground is without substance.

Ground 10

[17] Although the complainant was examined five days after the rape, the doctor testified that when he examined the complainant, he found that there was 'forced penetration' and according to the doctor if there was consensual sexual intercourse the glands around the vagina would excrete lubricants which makes it easier for penetration to take place. The doctor testified that his observation after examination were '*fourchette tender, vestibule tender, fresh tear, vagina difficult to examine, even with one finger, examination was painful*' that evidence by the doctor clearly corroborated the evidence of the complainant that she was raped. That ground is baseless and is dismissed.

Ground 11

[18] Although the complainant was examined 5 days after the rape, the bruises on the back of the complainant observed by the doctor, were consistent with the evidence of the complainant that she was thrown on the ground in the toilet and sustained those bruises. The evidence of accused 4 was rejected by the court that he had consensual sex with the complainant in the toilet. This ground is also dismissed.

Grounds 12 and 13

[19] These grounds overlapped with grounds 7, 8, 9 and 10. They are also without substance.

Ground 14

[20] 14.1 Ms. Tjivau testified that when she spoke to the complainant she was sad, crying continuously and unstable. Ms. Tjivau also testified that under those circumstances she did not ask her in detail what had happened as she was crying continuously. Under those circumstances it is understandable that perhaps she also mentioned that she was raped by accused 1 in the toilet or she was misunderstood by Ms. Tjivau. This ground is also dismissed.

14.2 This ground is unclear and without substance.

14.3 Ms. Esnath Kauami is the mother of the complainant and she testified that when they met with the complainant they both cried and the complainant told her that she was raped by 4 boys in the toilet and in the boys' hostel. That contradiction may be ascribed to the emotional State in which the complainant was or it may have been a misunderstanding on the part of Ms Kauami. This ground is also without substance.

14.4 The court found that Nicola Kazondendu was less candid with the court when she testified that the complainant decided to go and watch TV with accused 3, whilst all along she (complainant) testified that she was hungry and was on her way to the location to search for food and for her to abandon the search for food in favour of going to watch TV was highly unlikely. The court found that it was mindful of the contradictions and discrepancies in the evidence of the complainant. However, the fact that there were contradictions and discrepancies in her evidence, does not mean the court must reject her evidence about the rape as untruthful especially where there was corroboration from the doctor and other witnesses. That ground is also without substance and is also rejected.

Ground 15

[21] This ground is dealt with in 14.4 and is without substance and is rejected.

Ground 16

[22] This is not a ground of appeal.

Grounds 17 and 18

[23] The court assessed and evaluated the evidence of accused 2 on page 28-29 and said the following 'He testified that *complainant was never before in his room, did not tell her that he was sleeping in room 3 and on that specific bed. There were 12 beds in that dormitory. That weekend was an out weekend and he did not meet with the complainant to tell her that he would be around. According to him, there were more than 7 dormitories at the hostel for boys. The questions that arise immediately are the following: how did the complainant know that he would be around that weekend? That he was sleeping in room 3 and on that specific bed in which she was allegedly found in sleeping? The court asked accused 2 those questions and he answered by saying he did not know.*' After the court considered and evaluated the evidence as above the court came to the conclusion thus: 'It is highly improbable that the complainant will simply go to the boys' hostel, go to room 3 and sleep on accused 2's bed, keep the lights on and the door open wait for accused 2 to arrive and demand sex from accused 2.'

[24] The court assessed and evaluated the evidence of accused 4 on page 29 before arriving at the conclusion as follows in the judgment: 'The evidence by accused 4 that, they saw the security guard that is why they went into the toilet is not true.' There was evidence from other witnesses that the security guards were not there at all and therefore the evidence by accused 4 was not true at all. These grounds of appeal are without merits.

Ground 19

[25] The court considered the evidence as a whole and with regard to the evidence of the principal Mr. Ngozu, the court at page 28, of the judgment said the following:

'According to him accused 1 told him that he was trying to have sex with the complainant, and then the girl fell down on the floor. When it was put to accused 1 why the principal would testify that, he replied, "my lord I have no comment why the principal have to testify such a thing, I do not have comment. He further States "me and the principal were just normal since we were also communicating very well.'

The court further assessed the evidence and Stated: 'why would the principal lie about that and single out accused 1, out of the four accused who were summoned to his office.'

The court also stated that: 'I have closely observed Mr. Ngozu when he testified and he made a good impression on me. He came to tell the truth and the court is satisfied he told the truth.' This ground is without merit and is rejected.

Ground 20

[26] The court assessed and evaluated all the evidence before arriving at the conclusion of the judgment. On page 26 the court Stated: 'The complainant was subjected to intense and lengthy cross-examination.' The court further Stated in the judgment: 'I have carefully considered the totality of the evidence, the inherent strength, weakness and probabilities on both sides....'

There is no merit in this ground.

Ground 21

[27] This is not a ground of appeal

[28] In the result, there are no prospects of success on appeal and therefore the application for leave to appeal is dismissed.

GN Ndauendapo
JUDGE

APPEARANCES:

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RESPONDENTS:

K ETERHUIZEN

**Of the Office of the Prosecutor-
General**