



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 13/2016

In the matter between:

**VICTOR KAWE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kawe v S* (CA 13/2016) [2017] NAHCNLD 26 (7 April 2017)

**Coram:** JANUARY, J and TOMMASI, J

**Heard:** 17 March 2017

**Delivered:** 07 April 2017

**Flynote:** Criminal Procedure – Appeal – Legal representation – Order to proceed without legal representation – Failure to assist unrepresented accused with cross-examination – Misdirection – Appellant’s defence corroborated – Reasonably possibly true – Conviction and sentence set aside.

**SUMMARY:** The appellant was convicted for theft and sentenced. He indicated that he wanted legal representation. His lawyer wrote a letter to the presiding magistrate that he did not have right of audience and requested a postponement. The magistrate refused a postponement and ordered the trial to proceed. In addition, the magistrate did not assist the appellant in cross-examining witnesses. The conduct of the learned magistrate is a misdirection. The appellant's defence is reasonably possibly true. The conviction and sentence are set aside.

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### **ORDER**

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1. The appeal is upheld.
  2. The conviction and the sentence are set aside.
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### **APPEAL JUDGMENT**

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**JANUARY, J (TOMMASI, J CONCURRING)**

[1] The conviction and sentence in this matter were set aside on 17 March 2017 and the court indicated that reasons will be given. These are the reasons:

[2] The respondent is represented by Ms Amupolo and the appellant by Mr Tjiteere. Ms Amupolo correctly conceded that the magistrate misdirected herself in convicting the appellant.

[3] The appellant was amongst two other co-accused sentenced to imprisonment of 5 (five) years on a count of theft of N\$12 091.18. He appeals against conviction and sentence.

[4] It appears from the lower court record that this case was enrolled in 2009. At some point it was withdrawn and re-enrolled in January 2013. The accused's rights to legal

representation were however explained on 15 January 2013 when five accused were before court. The appellant opted to conduct his own defence.

[5] The case was enrolled from time to time. On numerous occasions either one or more of the accused were absent in the proceedings. Warrants of arrest for the absentee accused were issued on numerous times. The appellant was absent once. One of the accused passed away in the meantime.

[6] Eventually when the case was enrolled for trial on 01 July 2015, it was 4 years and 6 months from the date when the appellant's right to legal representation was explained. It is not clear from the record when the appellant decided to have a legal representative in the matter. He initially indicated that he will conduct his own defence.

[7] The legal representative for the appellant provided and forwarded a letter that he did not have right of audience in the court below and requested for another postponement. It seems apparent that he was not yet admitted as a legal practitioner. The letter does not indicate when the legal representative will have right of audience or what steps he took to have right of appearance.

[8] I do appreciate the frustration of the magistrate in this matter as it continued for a relatively long time before proceedings could commence. The learned magistrate exercised her discretion, refused another postponement and ordered that the trial should commence. I agree with the magistrate that when accused unnecessary delay proceedings that a presiding officer has a discretion to refuse further postponements and order proceedings to continue. It must indeed be certain that the delay caused was tactical. The record neither reflects that the appellant intentionally delayed proceedings nor did the magistrate enquire from him why it took him so long to engage the service of a legal practitioner.

[9] The appellant pleaded without a legal representative and the case continued with the witnesses of the State testifying.

[10] Article 12(1)(e) of the Constitution provides:

'All persons should be afforded adequate time and facilities for the preparation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.'

[11] I agree with Shivute, J where she states in *S v Kambatuka* 2014 (4) NR 1142 (HC) at 1145 E-F:

[12] The rights provided by the Constitution in the above article are there to ensure that all offenders charged with criminal charges and appearing before a criminal court are afforded a fair trial. The right to be represented is a fundamental right. Whether the failure of the accused to be afforded the opportunity to be represented results in a failure of justice is a question of fact which depends on the circumstances of each case.' (my emphasis)

[12] The learned magistrate explained the right to cross-examination to the appellant as per a drafted roneo form. The appellant indicated that he understood. The learned magistrate, however, did not assist the accused in his cross-examination.

[13] In my view, this offends against the Constitutional right to a fair trial and constitutes an irregularity.

[14] In addition, she found that the State made out a *prima facie* case. I have to considerably disagree. The accused from the outset of the proceedings stated that he was hired as a person to transport the co-accused belongings to a certain place. The appellant was corroborated with this explanation throughout the trial with his witness and some of the accused that they hired him for that.

[15] I am of the view that the appellant's version in the circumstances is reasonably possibly true and should have been accepted as such. It was not disproved by the prosecution on whom the duty rests to prove a case beyond reasonable doubt. I consider this as another misdirection of the learned magistrate.

[16] As a result:

1. The appeal is upheld.
2. The conviction and the sentence are set aside.

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**H C JANUARY**

**JUDGE**

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**M A TOMMASI**

**JUDGE**

**APPEARANCES:**

For the Appellant:

Mr Tjiteere

**Of Dr Weder, Kauta & Hoveka Inc.**

For the Respondent:

Adv. Amupolo

**Of Office of the Prosecutor-General**