CASE NO.: CA 41/2009

IN THE HIGH COURT OF NAMIBIA
HELD IN OSHAKATI

In the matter between:

JULIUS KAFIDI **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, A.J. *et* SHIVUTE, A.J.

Heard on: 24.11.2009
Delivered on: 24.11.2009
Reasons released: 25.11.2009

APPEAL JUDGMENT

LIEBENBERG, A.J.: [1] When the appeal against conviction and sentence as well as appellant's application for condonation of the late filing of the Notice of Appeal were heard, the Court refused the application and what follows are the reasons for the decision reached by this Court.

[2] Appellant was tried in the Regional Court sitting at Eenhana on charges of rape in contravention of s.2 (1)(a) of the Combating of Rape Act, 2000 (Act No. 8 of 2000) alternatively, committing an indecent or immoral act with a child under the age of sixteen years in contravention of s.14 (b) of the Immoral Practices Act, 1980 (Act No. 21 of 1980), as amended. At the end of the trial appellant was convicted on the main count and sentenced to a term of 15 years imprisonment. The appeal lies against his conviction and sentence.

[3] Ms. Kishi appeared *amicus curiae* and we wish to extend our gratitude to her for having assisted the Court in that regard. Mr.Haindobo appeared for the respondent.

[4] Appellant was unrepresented during the trial and after the court *a quo* sentenced him, the learned magistrate explained the following:

> *"You have the right to appeal either this conviction or sentence or both if you are dissatisfied with either the conviction or sentence or both to the High Court of Namibia and the procedure is if you desire to appeal you have to write down your grounds of appeal, bring the same to the office of the Clerk of Court Eenhana Magistrate's Court who will then prepare the record for purposes of appeal. Do you understand?* (emphasis provided)

Appellant's response was that he understood what had been explained to him.

[5] Proceedings were brought to a close on 4 July 2008 when appellant was sentenced, whereafter he had fourteen (14) days to file his Notice of Appeal with the Clerk of the Court at Eenhana. The Notice of Appeal in which the grounds are set out (dated 8 November 2008) and a document titled "Application for Condonation of late filing Notice of Appeal" were received by the Clerk of the Court at Eenhana on 20 November 2008. Appellant therefore seeks this Court's indulgence for having filed his notice four months out of time.

[6] I pause here to point out that although the magistrate in his explanation of the appellant's right to appeal did explain to him how and where he could submit an appeal, he failed to inform the appellant that he had to note his appeal within the required period of fourteen (14) days. The core of the appellant's application for condonation, however, is that he did not know what *procedure* he had to follow in noting an appeal.

[7] The Application for Condonation has no affidavit to it in which the appellant explains the circumstances why the notice was filed out of time and why, in his view, there are prospects of success on appeal. In this document he states the following:

> *"The appellant is a layman, illiterate without any knowledge regarding Notice of Appeal issues. It is here in Oluno Reh Centre where the appellant (was) told (of) the Notice of Appeal procedure after many days as the appellant was in doubt regarding Notice of Appeal. The above stated reasons are the reasons that cause the appellant to not file the Notice of Appeal within a prescribed duration of time."*

[8] From the aforementioned, it is clear that the appellant very well knew that his appeal was out of time and first had to obtain condonation from this Court before he could prosecute his appeal. Appellant furthermore did not in his Application for Condonation explain on affidavit his late filing of the notice and non-compliance with the rules as he was required to do and instead, noted his explanation in the document referred to as the condonation application.

[9] In the explanation advanced by the appellant he contends that it was only when he came to Oluno Rehabilitation Centre (prison) that it came to his attention "after many days" that he could appeal his conviction and how he should go about doing that. That clearly contradicts his answer in court after his right to appeal and the procedure to do so were explained to him by the magistrate at the end of the trial; to which he responded that he understood. Appellant's explanation therefore is simply not true, as he already knew from the day he was sentenced, that he could appeal and how he should go about lodging an appeal. Appellant's application for condonation is

therefore, in the true sense, not *bona fide.* That possibly explains why his explanation was not given on oath.

[10] After referring to the case of *S v Mantsha*, 2006 (2) SACR 4 (CPD) where it was said that: *"The Rules are for all litigants. They must be adhered to by all litigants. That is the basic principle which applies.",* Damaseb, J.P. in *Kalenga Iyambo,* (unreported) Case No. CA 165/2008 delivered on 19.10.2009 at par. [10] said the following:

> *"What we want to stress is that lay litigants are just as much under an obligation as those represented by lawyers to follow the rules of Court and cannot, as they please, not comply with the rules of Court.*

I respectfully endorse the remarks made in the *Iyambo*-case (supra) as there cannot be two different sets of rules applicable to legally represented and unrepresented lay litigants, respectively. The basic principle is that the rules of the court must be adhered to.

[11] It is trite that a Court of Appeal may relax the rules in granting condonation where a (lay) litigant did not comply with them, however, there are limits thereto and the Court will only grant condonation on good cause shown i.e. when the Court is satisfied that the explanation advanced justify the granting of the indulgence sought. In this appeal the appellant could successfully have argued that he was unaware of the time limit, but instead chose to advance reasons which are clearly not true. Neither did he give those reasons on oath as he was required to do.

[12] Condonation is not there for the asking and applications for condonation (especially those brought by lay persons) have become commonplace in criminal appeals, which, in my view, emphasises the need for those applications to meet the requirements set out in the rules of the court and which should only be relaxed on good cause shown. As I have indicated earlier, the appellant in his application did not advance *bona fide* reasons on oath explaining his non-compliance with the rules;

reasons which, in my view, would be reasonable and sufficient to show good cause and to grant him the condonation sought.

[13] Ms. Kishi, from the outset, submitted that when regard is had to the grounds raised by the appellant in his Notice of Appeal, there were, in her view, no prospects of success on appeal. Whereas she appeared *amicus curiae,* the Court invited the appellant to make submissions regarding the grounds he had raised in his notice, which amounted to him requesting the Court to reduce his sentence. I interpose here to remark that appellant did not advance a single ground of appeal against sentence in the notice filed and it only now came up when he was invited to argue the appeal before us.

[14] The view taken by Ms. Kishi is realistic and consistent with the evidence adduced during the trial. The grounds raised in the appellant's notice, in broad outline, amount to the following: That the presiding magistrate was bias by not accepting the appellant's version as being true; medical evidence did not prove that it was him who committed a sexual act with the complainant; and that the evidence was a fabrication by the complainant and as such, inconsistent and contradictory.

[15] The evidence proved beyond reasonable doubt that a sexual act had been committed with the complainant; that she did not sleep at home on the night of the alleged incident; that complainant's footprints were seen coming from the appellant's room (the neighbour), leading directly to the house of Helaria Jonas with whom complainant was staying; that after complainant reported to Helaria that she had been raped by the appellant she examined the complainant's genitalia and observed Vaseline on it; that appellant, when confronted, admitted to Helaria and David Shinana that he had slept with the complainant "because he was drunk"; and lastly, that from the medical report compiled in respect of the complainant later the same day, two tears of approximately 0.5 cm in size were observed on the labia minora.

[16] The complainant's evidence was that she was on her way home after sunset when the accused picked her up and carried her into his room where he had sexual

intercourse with her after he had applied Vaseline to her genitalia. She thereafter fell asleep and early the next morning he again had sexual intercourse with her whereafter he told her to leave. Upon her arrival at home she woke Helaria and told her what had happened. There is sufficient corroboration from the evidence given by the witnesses Helaria and David; as well as the medical evidence, that satisfied the trial court that complainant told the truth namely, that the accused had raped her.

[17] The evidence beyond reasonable doubt proves that the appellant committed a sexual act with the complainant who, at that stage, was 12 years of age. His conviction therefore, is consistent with the proven facts and the grounds raised by the appellant in his Notice of Appeal are nothing more that unsubstantiated allegations, completely without merit.

[18] We therefore came to the conclusion that there were no prospects of success on appeal and for the reasons set out in this judgment, refused appellant's application for condonation.

LIEBENBERG, A.J.

I agree.

SHIVUTE, A.J.