

SOUTH AFRICA / JUDGMENT

Mjoki v S (CA&R 39/2019) [2020] ZAECMHC 20 (17 June 2020)

[2020] ZAECMHC 20

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Dunywa, Tokota

CASE / FILE NUMBER

CA&R 39/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE PROVINCIAL DIVISION, MTHATHA)

CASE NO: CA&R 39/2019

Date heard: 20 May 2020

Date delivered: 17 June 2020

In the matter between

SIPHOSETHU MJOKI Appellant

And

THE STATE

Respondent

JUDGMENT

DUNYWA AJ:

1. The appellant, who is a spaza shop operator was arraigned in the Regional Court Lusikisiki, on two counts of rape. The complainants are minor children of 7 and 8 years respectively. The appellant was legally represented throughout the proceedings. He pleaded not guilty to the charges but was nevertheless convicted of an attempt to commit a sexual offence on each count.

2. The appellant was sentenced to undergo 10 years' imprisonment on each count. The sentences were ordered to run concurrently in terms of section 180 of the Criminal Procedure Act 51 of 1977 (the CPA). With leave of this court the appeal is against both conviction and sentence.
3. When granting the leave to appeal on 25 June 2019 this court ordered in paragraph 2 that:
"The record must be amplified to include the exhibits referred to in the evidence."
4. On the date of the hearing of the appeal both counsel representing the appellant and the State were not in attendance. This was due to the prevailing circumstances of Covid19 pandemic, and it was decided that it was not safe to have proceedings in open Court. The parties agreed that the matter should be disposed of in terms of sec 19(a) of the Superior Courts Act 10 of 2013 i.e. without the hearing of oral argument.
5. Notwithstanding the order of this court alluded to in paragraph 3 above the appellant failed to include exhibits as part of the transcribed record which served before this court. Therefore, there has been non-compliance with the order of this court alluded to in paragraph 3 above. It is the duty of the appellant to ensure that the appeal papers are in order. In terms Rule 51(3) of the Uniform Rules of Court "(t)he ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court shall rest on the appellant or his or her legal representative." As stated above the appellant is represented by attorneys.
6. In *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2017 (11) BCLR 1408 (CC) at para 54 it was held:

[54] In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron JA (as he then was) for the majority in *Fakie*:

"[W]hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."

Determination

of this appeal would involve reference to some of the exhibits as will be shown below. Parts of the exhibits were in fact read into the record in particular regarding the injuries sustained by the complainants.

7. In the event such exhibits are no longer available it was incumbent upon the appellant to apply for condonation giving full explanation for his failure to comply with the order of this court. It appears as if the court order was simply ignored. In *Victoria Park Ratepayers' Association v Greyvenouw CC and others*[1]:

"[22] The right guaranteed section 34 (Constitution) would be rendered meaningless if court orders could be ignored with impunity: the underlying purposes of the right – and particularly that of avoidance of self-help – would be undermined if litigants could decide which orders they wished to obey and which they wished to ignore. The Constitution recognises this in section 165, the section that creates the judicial authority. Section 165(3) provides that "[n]o person or organ of State may interfere with the functioning of the courts" and section 165(5) provides that any order issued by a court "binds all persons to whom and organs of State to which it applies".

8. This court cannot be a party to the proceedings where its orders are ignored or not complied with since that would undermine the rule of law. The rule of law is jealously guarded by our courts. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution.
9. One of the material grounds of appeal relates to the exhibits and it reads as follows:

"The admission of J88 was in flagrant violation of the provisions of section 212 (4)(a)(i) or (iv) (of the Criminal Procedure Act) in that no affidavit was admitted as evidence which showed that the person who compiled the J88 was either in the service of the State or of provincial administration or attached to the South African Institute for Medical Research or any University in the Republic of South Africa. On one (sic) gave evidence that they established such facts by means of such an examination or process. In the absence of such an affidavit the court should have involved the provisions of section 212(12) requesting such a person to give viva voce evidence[2]".

10. The two J88 (medical report) forms which are the exhibits are not part of the appeal papers submitted to this court yet they are central to the appeal. In *Phakane v S*[3] it was held:

[39] As to when it can be said that an incomplete record will result in the infringement of an accused's right to a fair appeal, in *S v Chabedi*[4] the Supreme Court of Appeal said:

"[T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal

of everything that was said at the trial.

The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

11. I am of the view that failure to ensure that the papers are in order, in terms of the Rules of this court, particularly where this was brought to the notice of the appellant, drives me to an ineluctable conclusion that the appeal cannot be heard and falls to be struck off the roll. In this term alone more than one appeal has been struck from the roll for the same reasons.

This has an effect of delaying the appeal proceedings and justice. This appeal has been delayed for a period of one year since the petition was granted. This sort of work should be frowned upon and condemned by a court, as I hereby do.

12. In the decision of *S v Ngxitho*[5] it clearly puts the responsibility of ensuring that the record is complete, with papers properly filed, indexed and paginated on the appellant's legal representative when the following was stated:

"If an attorney is prepared to accept an instruction from a client, it is his duty, even if he has to do the work connected therewith pro deo, to devote his full attention to the instruction and to do the work in connection therewith properly. A serious warning is directed to attorneys that, if appeal records do not in future comply with Rule of Court 51(3), it can easily happen that the appeal will be removed from the roll."

13. Accordingly, it is ordered that the matter is struck of the roll and may not be re-enrolled until such time as the complete record shall have been filed.

M.S. DUNYWA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered,

TOKOTA

JUDGE OF THE HIGH COURT

Appearing on behalf of the Appellant:

Instructed by: Legal Aid South Africa

Appearing on behalf of the Respondent:

Instructed by: Director of Public Prosecutions

[1] [2004] 3 All SA 623 (SE) at para 22.

[2] Page 103-104 of the Index to Papers.

[3] 2018

(4) BCLR 438 (CC)

[4] [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) at page 417 para 5.

[5] 1979

(1) 1038 (OPD) headnote.

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