

SOUTH AFRICA / JUDGMENT

S v Nkumanda (CA&R45/2023) [2024] ZAECKMKHC 31 (19 March 2024)

[2024] ZAECKMKHC 31

COURT

Eastern Cape High Court, Makhanda

BEFORE

N G Beshe, M S Rugunanan

CASE / FILE NUMBER

CA&R45/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: CA&R45/2023

In the matter between:

Delivered: 19 March 2024

THE STATE

And

SINETHEMBA NKUMANDA

SPECIAL REVIEW JUDGMENT

Beshe J

- [1] This is an application for the review and setting aside of applicant's conviction and sentence by the Regional Court, sitting in Addo. The applicant together with another were arraigned for inter alia, murder.
- [2] The basis for the application is that the trial was vitiated by an irregularity in that contrary to the provisions of Section 93ter
- (1) of the Magistrates' Court Act[1], the trial was conducted without assessors. And that the applicant had not indicated that he elected that the trial proceeds in the absence of assessors. It appears to be common cause or at least not in dispute that the applicant's trial proceeded in the absence of assessors and that the applicant did not request that the trial should be conducted without assessors.

[3] Section 93ter (1) provides that:

‘The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice–

- (a) before any evidence has been led; or
- (b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summons to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if any regional court on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion

summon one or two assessors to assist him.’

This provision is peremptory in the case of a trial on a charge of murder before the Regional Court. Failure to give effect to Section 93ter

- (1) taints the proceedings with an irregularity. In *Gayiya v State*[2] the appeal against convictions and sentences was upheld on the basis that the Regional Court that tried the accused in that matter was not properly constituted. The *Gayiya* matter was recently quoted with approval in *Khaka & Another v State*[3] delivered on the 8 March 2024 by the North-West High Court.
 - [4] In the circumstances, the review falls to be upheld on the basis that the proceedings were not in accordance with justice for the reason stated earlier i.e. failure by the trial court to act in terms of Section 93ter (1).
 - [5] The applicant and his co-accused were convicted and sentenced during
2013. The review application was instituted in 2023. The applicant has sought condonation for the delay in launching the application. Based on the reason mainly that, as soon as he became aware of the irregularity, the application was instituted without delay. In my view, the applicant has succeeded in showing good cause for the granting of the condonation sought in this regard.
- [6] The office of the Eastern Cape Director of Public Prosecutions is to be commended for taking it upon itself to bring the matter to the attention of this court by seeking a review of the matter in terms of Section 304 (4) of the Criminal Procedure Act[4] (Special Review). This, upon establishing that the application for review has not been filed with the Registrar’s Office.

- [7] The convictions and sentences in respect of applicant's co-accused were set aside as a result of the irregularity averted to earlier in this judgment, on 26 October 2021.
- [8] In the result, the following order will issue:
1. The late institution of these proceedings is hereby condoned.
 2. It is ordered that the applicant's convictions and sentences handed down in the Regional Court sitting in Addo on 23 August 2013 in respect of case number RC31/2012 be and are hereby reviewed and set aside.

N G BESHE

JUDGE OF THE HIGH COURT

RUGUNANAN J

I agree.

M S RUGUNANAN

- [1] Act 32 of 1944.
- [2] 2016
- (2) SACR 165 SCA at 171.
- [3] (Cas 27/2023) [2024] ZANWHC.
- [4] Act 51 of 1977.

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Prepared on 11 October 2026 · Esheria