

Government loses appeal on 48-hour rule

27 March 2014

[The Namibian](#)

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THE Supreme Court yesterday dismissed an appeal filed by the safety and security minister against a High Court judgement in which one of the men acquitted in the main Caprivi high treason trial won a damages award of N\$12 000.

The constitutional right to be brought before a court within 48 hours after arrest is undoubtedly an important right accorded to arrested persons and should be guarded jealously in light of Namibia's pre-Independence history of detention without trial and other related injustices, Chief Justice Peter Shivute said in the judgement in which the minister's appeal was dismissed.

"We must guard against laxity and aspire to setting very high standards for compliance with constitutional rights, especially those having a bearing on the liberty of individuals," the chief justice said.

He made the remarks in a judgement on an appeal the minister of safety and security lodged against a judgement in which High Court Judge President Petrus Damaseb awarded damages of N\$12 000 to one of the former accused in the main Caprivi high treason trial, John Genese Kabotana, in June 2012.

Judge President Damaseb found that Kabotana was unlawfully detained for two days after he had not appeared before a magistrate within 48 hours following his arrest on 1 September 1999.

According to police witnesses who testified during the hearing of the case before the judge president, Kabotana was taken to the Katima Mulilo Magistrate's Court on the afternoon of 3 September 1999, which was a Friday, but at that time there was no magistrate or prosecutor available at the court. Kabotana then made a first appearance before a magistrate at Grootfontein on the following Monday, and was remanded in custody.

He remained in custody for more than 13 years, until he and 42 co-accused were found not guilty by Judge Elton Hoff in February last year.

Kabotana also wanted the High Court to order the minister to pay compensation to him over assaults that he claimed to have been subjected to after his arrest. That part of his claim against the minister was dismissed, though, after the judge president found that Kabotana had failed to produce any credible evidence that he had been assaulted.

The Constitution states that all persons arrested and detained in custody must be brought before the nearest magistrate or other judicial officer within a period of 48 hours after their arrest, or as soon as possible thereafter if such a court appearance is not reasonably possible within the 48-hour period.

If the 48-hour period runs out over a weekend, an arrested person has to appear in court on the first court day following the weekend, in terms of the Criminal Procedure Act.

“I must emphasise that the 48-hour requirement must act as a flashing red light in the minds of the officers processing suspects for onward transmission to court,” Chief Justice Shivute said in his judgement. “This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested unless it is not reasonably practical to do so.”

Although the police officers involved in Kabotana’s arrest were working under severe and testing conditions in the wake of the state of emergency that had applied in the Zambezi Region during August 1999, after alleged separatists had staged surprise armed attacks at Katima Mulilo on 2 August 1999, it was reasonably possible for them to have complied with the requirement of ensuring Kabotana’s first court appearance within 48 hours after his arrest, the chief justice found.

Acting Judges of Appeal Simpson Mtambanengwe and Kate O’Regan agreed with the chief justice’s judgement.

The minister was represented by George Coleman, on instructions from the Office of the Government Attorney. Norman Tjombe and Legal Assistance Centre director Toni Hancox represented Kabotana.