



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 06/2016

In the matter between:

**JESAYA KAULUMA & SAMSON H. KANDOLO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kauluma v S* (CA 06/2016) [2017] NAHCMD 216 (09 August 2017)

**Coram:** SIBOLEKA, J and UNENGU, AJ

**Heard:** 03 July 2017

**Delivered:** 09 August 2017

**Flynote:** Criminal Law – appeal against conviction and sentence – Appellant asking fine instead of imprisonment- No credible ground established against both conviction and sentence. Appeal – dismissed.

**Summary:** The appellant broke and removed items from a vehicle when he was arrested.

**Held:** Magistrate did not err in convicting and sentencing appellant for the offence Charged. Accordingly, the appeal against both conviction and sentence is dismissed.

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**ORDER**

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In the result I make the following order:

The appeal against both conviction and sentence is dismissed.

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**JUDGMENT**

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UNENGU AJ (SIBOLEKA J concurring):

[1] The Appellant (accused one) and another were charged with attempted theft of a motor vehicle in the Swakopmund Magistrate's court. They were not legally represented. The appellant tendered a plea of guilty while his co-accused pleaded not guilty. However, the plea of guilty tendered by the appellant which was changed to that of not guilty by the magistrate in terms of s 113 of the Criminal Procedure Act<sup>1</sup> herein referred to as the CPA. The appellant was convicted after the trial and was sentenced to 24 months imprisonment, hence the appeal against both conviction and sentence now before this court.

[2] The crux of the appellants concern is that he should have been given a sentence coupled with an option of a fine.

[3] The appellant's reasons of dissatisfaction on conviction appear to be the following:

- (a) The learned magistrate erred when she convicted me (the appellant) on the evidence of state (all) whose evidence was not clear in all material respect as requested by the law, more particularly as the learned magistrate had noted: that the witness / complainant testimony was highly improbable in all material aspects.

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<sup>1</sup> Act 51 of 1977.

- (b) The learned magistrate erred in rejecting my evidence without it being demonstrated that it was inherently untruthful and improbable to be rejected as false.
- (c) The learned magistrate failed to address the contradiction between the evidence of the State witness and that of the appellant.
- (d) The learned magistrate failed to give reasons why she could not impose a fine and instead of a long sentence in this matter.

[4] It is apparent from the notice of appeal that the appellant disagrees with the learned magistrate's evaluation and assessment of the evidence that led to his conviction.

[5] During the hearing the appellant was told by the court that he was convicted of attempted theft of goods from a motor vehicle. He suddenly conceded that he did not have a reason to complain against his conviction. I agree with the concession made because he admitted breaking into the vehicle and removing the radiator pipe. He was thereby caught in the act.

[6] On sentence, the appellant did not state how the magistrate has misdirected herself. He did not allege that the sentence was harsh, inappropriate or it induces a sense of shock.

[7] In assessing the sentence, the record shows that the learned magistrate considered the crime of theft which according to her, is not decreasing in her district, the interest of the society and the fact that the appellant has previous convictions of housebreaking with intent to steal and theft. That being so, I cannot find any justification to fault the sentence imposed on the appellant being a repeat offender. In fact a sentence of a fine would have been inappropriate in circumstances of this matter.

[8] Accordingly and for the reasons stated above, I come to the conclusion that the appeal against both the conviction and sentence should fail.

[9] In the result, I make the following order:

The appeal against both conviction and sentence is dismissed.

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P E UNENGU  
Acting Judge

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A SIBOLEKA  
Judge

## APPEARANCES

APPELLANT: Jesaya Kauluma (first appellant - In Person)  
at Swakopmund Correctional Facility

RESPONDENT: ML Olivier  
Office of the Prosecutor-General, Windhoek