NOT REPORTABLE

CASE NO.: CA 31/2009

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

ALPHEUS NESHILA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 27/05/2011
Delivered on: 23/09/2011

APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against conviction and sentence. The appellant was convicted in the district court of theft read with provisions of section 11(1)(a) 1, 14 and 17 of the Stock Theft Act[1], as amended[2] after pleading not guilty. The appellant was committed for sentence in the

[1] Act 12 of 1990
[2]Stock Theft Amendment Act 19 of 2004

regional court. The regional court sentenced the appellant to twenty (20) years imprisonment and suspended five (5) years thereof for a period of five years on condition that the appellant is not convicted of the same offence committed during the period of suspension. The appellant was unrepresented in both courts.

[2] The appellant noted the appeal against conviction and sentence out time. The appellant filed an affidavit explaining that he did not understand what it meant to appeal. The respondent did not oppose the appellant's "*application*" for condonation and conceded that the matter should be determined on the merits in respect of the conviction. Counsel for the appellant however pointed out in her argument that an irregularity occurred during the sentencing procedure and that the conviction and sentence ought to be set aside on this basis alone.

[3] The magistrate in the district court in her judgment did not give reasons for the conviction and merely indicated that the appellant was guilty as charged. The regional court magistrate however had the opportunity to exercise his discretion to determine whether the proceedings in the district court were in accordance with justice and if, in his opinion, there was any doubt, should have referred the matter to this Court for review as provided for in terms section 116(3).

[4] The appellant was unrepresented in both the district and the regional court. When the appellant appeared before the regional court for sentence, the regional court made the following remarks:

> "*Despite a few procedural or evidential defects the court is satisfied that the accused person was properly convicted of theft*"

The regional court magistrate did not stipulate what the procedural and evidential defects in the proceedings were. Having expressed doubts as to whether the proceedings were in accordance with justice, the appropriate cause of action under these circumstances was to transmit the record and his reasons to this Court for review. Two vitiating irregularities were apparent from the record and the regional court magistrate, despite the doubt he expressed that the proceedings were in accordance with justice, failed to transmit the record for review.

[5] The appellant was charged with having stolen four cattle that were in the care of Moses Thomas who was tasked by the regional authority council to take care of lost cattle. The appellant essentially did not dispute that three of these cattle were found in his kraal and that one was recovered from the *kraal* of WaVili where he left it. When testifying under oath the appellant testified that the 8 cattle belonging to WaVili were brought to Onamavo village by a certain Benny as they were destroying his mahango fields. He recognised one head of cattle and its calf as belonging to a certain Mr Leonard and another head of cattle followed him as he drove the cattle to Omutele. The appellant testified that he intended to return the three cattle

as he confirmed that the one head of cattle and the calf did not belong to Mr Leonard. Both WaVili and Mr Leonard apparently shared a post with the appellant. He left some cattle behind at Onamavo as he did not know who they belonged to.

[6] No reliable evidence was adduced by the State that the appellant removed the cattle from the kraal of Moses Thomas in whose care it was. Two witnesses however testified that the appellant had driven cattle from Onamavo village. One of the witnesses confirmed that the appellant drove his own cattle as well as those not belonging to him from Onamavo village. This witness confirmed that he saw cattle of WaVili at Onamavo village but could not say who brought them there. The second witness confirmed that Benny brought the cattle of WaVili to Onamavo. Both witnesses testified that the appellant left some of the unbranded cattle at Onamavo.

[7] After the appellant testified he requested the State to help him to call his witness Benny Indonguzu of Onumavo village. The matter was postponed several times in order to secure the attendance of this witness. The record reflects that a subpoena was issued. The State prosecutor informed the court that the investigating officer subpoenaed the defendant's witness; that he was in possession of the subpoena; and that the witness failed to attend court. The magistrate asked the appellant how he wished to proceed. The appellant asked for a postponement in order to secure the

attendance of this witness. On the adjournment date the appellant informed the magistrate that he was unable to secure the attendance of his witness despite the fact that he wrote a letter to him. After two attempts to convey to the magistrate that he required this witness to be present, the appellant simply gave up on the third attempt and informed the court that the matter may be finalised without the witness.

[8] The magistrate had a discretion in terms of the provisions of section 188(2) read with section 170(2), to issue a warrant for the arrest of this witness after he had failed to appear at court on the date provided for in the subpoena. Instead of exercising this option, the magistrate opted to find out from an unrepresented accused how she should proceed. The appellant was not informed that such a course was available to the magistrate in order to request that such a warrant be issued. The testimony of this witness was crucial to the defence of the appellant. The failure by the magistrate to inform the accused of the provisions of section 188(2) in order to secure the attendance of this witness prejudiced the appellant in presenting his defence to the court.

[9] After the appellant informed the court that he was unable to secure the witness' attendance and that the case may be finalised the following transpired:

"*PP Apply acd be found guilty and convicted as charged.*

Judgment: Guilty as charged"

It is apparent from the record that the appellant was not afforded the opportunity to address the court after all the evidence had been adduced as provided for in section 175. This was a serious irregularity. (See *S v KHOEINMAB 1991 NR 99 (HC*) where O'Linn J as he then was, at page 101 stated that: "*The accused has the right to address the Court, regardless of his prospects of success. Such an irregularity destroys the fairness of the trial and must be regarded as a gross irregularity.*")

[10] The cumulative effect of the irregularities is such that it deprived the appellant of a fair trial and justice demands that the conviction and sentence be set aside.

[11] In the premises the following order is made:

1. The application for condonation for the late noting of the appeal is granted;
2. The appeal against conviction and sentence is upheld and the conviction by the district court and sentence imposed by the regional court are hereby set aside.

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TOMMASI J

I concur

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LIEBENBERG J