CASE NO.: CA 01/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

MANJUVI TJAMBIRU **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 07.02.2011
Delivered on: 18.02.2011

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant appeared before the magistrate of Opuwo on a charge of stock theft, read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990), as amended, for allegedly having stolen one heifer, valued at N$2 000.

[2] He was convicted on his plea of guilty and committed for sentence by the Regional Court in terms of s 114 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the Act'). I pause here to observe, that it would appear from the record of proceedings that the magistrate was

of the opinion that the offence of which the accused had been convicted, was such that it merits punishment in excess of the jurisdiction of the Magistrate's Court (s 114 (1)(a)). In reaching that conclusion, he could only have relied on the value of the heifer mentioned in the charge; read with the provisions of s 14 (1)(a) of the Stock Theft Act, prescribing minimum sentences applicable, based on the value of the (stolen) stock. Appellant was a first offender.

[3] When appellant subsequently appeared in the Regional Court, his right to legal representation was (again) explained to him, as well as the penalty clause applicable (s 14 (1) (a)). Immediately after the accused informed the court that he would appear in person, the court explained to him his right to mitigate; to which he replied that he had no witnesses to call, but would testify under oath. The full extent of his evidence is captured in four short sentences, quoted *in extenso:*

> *"I am not married, I just left my home with no one. I have two children. The children are with my mother. I am unemployed I only take care of live stock."*

Appellant was not cross-examined by the prosecutor and no further information was elicited from the appellant by the court. Appellant was not afforded the opportunity to make further submissions if he so wished. After the prosecutor's submissions, the court pronounced itself on whether there were substantial and compelling circumstances present, justifying a lesser sentence or otherwise; and proceeded by imposing a sentence of twenty years imprisonment. No reasons were given for the sentence imposed. The appeal lies only against sentence.

[4] On 14 April 2009 the clerk of court, Opuwo, received a Notice of Appeal from the appellant, dated 7 March 2009. The notice was clearly filed out of time.

[5] Ms. *Mainga,* appearing on behalf of the appellant on instruction of the Directorate: Legal Aid, in Court handed up a document styled 'Notice of Appeal' and dated 9 September 2010. Although this notice was already filed with this Court on 23 September 2010, there is no copy

on the court file. Five new grounds of appeal are mentioned in the 'second' notice; and although not said in so many words, it would appear that those grounds raised in the original notice, have been abandoned. The grounds relied on are:

- Appellant was not afforded a fair trial as the magistrate failed to inform him of the provisions of s 114 (2) of Act 51 of 1977;
- The magistrate committed an irregularity by not having made a formal finding (of guilty) in terms of s 114 (3)(a);
- The magistrate failed to assist the unrepresented appellant;
- The magistrate erred in law and/or on the facts in failing to take the personal circumstances of the appellant into account when sentencing;
- The magistrate erred in law and/or on the facts by not suspending part of the sentence, despite having found that there are no substantial and compelling circumstances.

[6] An unstamped document dated 31 January 2011 and styled 'Additional Grounds of Appeal' forms part of the documents filed of record and contains three more grounds of appeal, namely:

- The court *a quo* failed to comply with the provisions of s 114 (1) of the Act;
- The magistrate erred in law and/or on the facts in not finding substantial and compelling circumstances;
- The sentence imposed is harsh under the circumstances and induces a sense of shock.

[7] It is common cause that the appellant filed his appeal outside the prescribed time limit. In a substantive application appellant applied for condonation of the non-compliance with the Rules of Court and the late filing of the Notice of Appeal and Additional Grounds of Appeal.

Appellant under oath advanced reasons explaining the delay, which is not relevant for purposes of this judgment. Mr. *Lisulo,* appearing on behalf of the State, did not oppose appellant's application for condonation for reasons, that he was of the view, that there were prospects of success. On the facts, the concession is properly made and condonation is accordingly granted.

[8] In the resent past this Court, in several unreported judgments, already considered and discussed the very same issues that arose in this appeal, all relating to the same magistrate, and I can do no better than referring to what was stated therein. (See: *Elizabeth Iileka v The State,* Case No. CA 96/2009 delivered on 30.07.2010; *Naurasana Undari v The State,* Case No. CA 113/2009 delivered on 12.08.2010;

Erastus Munongo v The State, Case No. CA 104/2010). In defence of the magistrate, I should mention that these judgments were only delivered long after the cases from which the appeals stem, were finalised; and therefore could not be adhered to at the time.

[9] Before I consider the ground of appeal set out in the notices respectively, there is one issue not raised, but which deserves some attention. Subsequent to pleading guilty, the appellant was questioned pursuant to the provisions of s 112 (1)(b) of the Act; and coming to the value of the stolen stock, the record reflects the following:

> *"Q: The value of the beast (sic) is here given as N$2 000 do you agree with that? A: I cannot <u>dispute</u> that."* (Emphasis provided)

[10] Although it was not essential to prove the value of the stock in order to convict, the magistrate still had to form the opinion that the value of the stock is N$500 or more, before stopping the proceedings and commit the accused for sentence by the Regional Court. As mentioned hereinbefore, it seems that the magistrate merely acted on the value stated in the charge and the accused's reply that he could not dispute the value. It has been firmly established that as far as it concerns the value of stock on a charge of stock theft, a magistrate,

guided by the provisions of s 14 (1) of the Stock Theft Act and acting in terms of s 114 (and 116) of the Act, would only be entitled to commit an accused for sentence by the Regional Court *after* the value of the stolen stock has properly been determined - either by admission (if the accused is capable of making it) or through evidence being led. Where the accused does not place the value in dispute, it does not *per se* mean that the value of the stock has been admitted

(Naurasana Undari; Erastus Munongo (supra)). The value of the stock mentioned in the charge is nothing more than an *estimated value* and where the State wants to rely on that value for purposes of sentence under s 14 (1), then it has to prove that value by leading evidence in terms of s 112 (3) of the Act. That would obviously not be necessary where the value has duly been admitted by the accused - on condition that the value of the stock was within his knowledge **(S** *v Mauwa* 1986 (4) SA 818 (SWA)). In *S v Kauleefelwa* 2006 (1) NR 102 (HC), Maritz J, (as he then was) at 105A-C stated the following:

> *"If it is the prosecution's case that the value of the cattle was N$500 or more and that the provisions of s 14 (1)(a)(ii) of the Act apply (requiring, in the absence of substantial and compelling circumstances, the imposition of a minimum sentence of no less than 20 years' imprisonment without the option of a fine in the case of a first conviction), it has to prove such value. In the absence of such proof, the magistrate will be constrained to apply the provisions of s 14 (1)(a)(i) and to sentence the accused, if he is a first offender, to imprisonment for a period of not less than* ***two years*** *without the option of a fine."* (Emphasis provided)

Therefore, in the present case, without the value of the stock properly determined to be N$500 and more, the magistrate had no authority to act on when committing the accused for sentence by the Regional Court in terms of s 114 (1), and by so doing, misdirected himself.

[11] When the matter came before the Regional Court and after complying with the provisions of s 114 (2) and (3) of the Act, the magistrate in that court, equally should have pointed out to the prosecution that the value of the stock was not duly established and evidence to that end had to be adduced in terms of s 114 (4). By relying on the value of the

stock, as alleged in the charge, and the accused's reply that he did not dispute it, the magistrate in the Regional Court, when sentencing, also misdirected himself by *mero motu* invoking the provisions of s 14 (1)(a)(ii); as he was not entitled to do so without the value being properly determined.

[12] That brings me to the non-compliance with the provisions of s 114 (2) and (3) of the Act. It is common cause that no compliance was given to these provisions by the Regional Court, as it was supposed to do *before* it could proceed with sentence. When dealing with an unrepresented and unsophisticated accused, with no or little knowledge of the law, the presiding magistrate, in my view, is under a duty to bring to the accused's attention, the purview of section 114 (2) ie that the accused (on a balance of probabilities), could satisfy the court that his plea and any admission made by him at the stage of pleading, were incorrectly recorded. If the accused succeeds therein, or the court is not satisfied that the accused is guilty of the offence of which he was convicted, and for which he was about to be sentenced, the court has no option but to enter a plea of not guilty and proceed with a trial. Should the accused however not succeed, then the court, in terms of s 114 (3) *shall* make a finding of guilty and sentence the accused. The Regional Court magistrate's failure to comply with these provisions amounts to an irregularity, vitiating the proceedings on sentence.

[13] Ms. *Mainga* urged this Court to consider and impose sentence, despite the irregularities, and relied on the *Munongo* case as authority. There is however a material difference between this case and the *Munongo* case. In *Munongo* the Court came to the conclusion - albeit reluctantly - that compliance was given to the provisions of s 114 (3). On the facts of that case, the Court found that when regard is had to the crime committed by the appellant; compared to the sentence he had already served, that it would unnecessary perpetuate sentencing proceedings to remit the matter to the Regional Court for sentence; and that it would be in the interest of justice for the Court to consider sentence afresh. Justice dictated that this Court considered sentence afresh on appeal; because the sentence already served by the appellant at that stage, most likely, exceeded any sentence a reasonable court, given the circumstances of that case, would have imposed. That is not the position *in casu.*

[14] I do not believe that this Court should try to step into the shoes of the court *a quo* simply because it has the power to do so, and without good reason. In any event, it would not serve the interests of justice by attempting to find a suitable sentence on the scanty information placed before the court *a quo;* and on which it was willing to pass sentence. Despite the appellant testifying in mitigation, no further information was elicited from him as regards his background; whether he had remorse for what he has done; why he stole his uncle's cattle and what did he use the money for; whether the stolen animal was recovered or not; and if not, whether any compensation was made to the complainant - if not by the appellant, then possibly by his relatives?

[15] At the stage of sentencing, a presiding officer must realise that in consideration of sentence, the court assumes a more active position; and that the presiding officer should take the initiative when necessary, to obtain, as much as is reasonably possible, facts and information relevant to sentence *(S v Dlamini* 1991 (2) SACR 655 (A) at 666h-667f). In order to get the necessary information before the court, it has to act positively *(Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at

205d-i).

[16] In the present case, the presiding magistrate can hardly be seen to have had before him, sufficient information for purposes of sentencing, and as such, was well positioned to impose a fitting sentence. Can it be said that, with the scanty information before him, the presiding magistrate came to a fair and just decision that there were no substantial and compelling circumstances present? I do not think so. It seems to me that the lesser the information before the court; the greater the chance of not finding substantial and compelling circumstances. No reasons were given for the sentence imposed - neither *ex tempore,* nor thereafter - which makes it impossible to determine which factors were taken into consideration and what weight was given thereto in sentencing. The omission on the part of the magistrate to meet the dictates of affording an accused person a fair trial is a misdirection; and the sentence imposed

as a consequence thereof, subject to intervention.

[17] Lastly, Ms. *Mainga* urged the Court to make an order to the effect that, once the matter is remitted to the sentencing court, sentence should be imposed within a period of six months as it has happened in the past in other cases that it took up to one year for sentence to be imposed afresh. Although mindful of such possibility, I do not deem it appropriate to prescribe to another court, beforehand, time limits in which it has to operate. Suffice it to say, that it will be in the best interest of justice to finalise the matter as soon as possible; and it does not prevent another magistrate to pass sentence in the absence of the magistrate initially seized with the matter (s 275). I accordingly decline to make any order to that effect.

[17] In the result, it is ordered:

1. The appeal against sentence is upheld.
2. The matter is remitted to the Regional Court sitting at Opuwo with the direction to deal with the case in accordance with the guidelines set out herein.

In sentencing, regard must be had to the sentence already served by the appellant.

LIEBENBERG, J

I concur.

TOMMASI, J

ON BEHALF OF THE APPELLANT	**Ms. I. Mainga**
Instructed by:	**Kishi Legal Practioners**
ON BEHALF OF THE RESPONDENT	**Mr. D. Lisulo**
Instructed by:	**Office of the Prosecutor-General**