



**CASE NO.: CC 18/2009**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**versus**

**EPHRAIM KARIKO**

**ACCUSED**

**CORAM: SIBOLEKA, J**

**Delivered on: 2011 January 21**

**SENTENCE:**

**SIBOLEKA, J**

[1] Mr. Ephraim Kariko, I have convicted you on Theft, and Defeating the

course of Justice and it is now my duty to consider an appropriate sentence for you. In doing so, I am alive to the factors mainly taken into account when considering sentence, namely the crime, the offender, and the interests of society, see *S v Zinn* 1969 (2) SA 537 (A). It is common course that a sentence should as a matter of fact be in line with the severity of the offence. I will also take into account the sentencing objectives such as prevention, deterrence, rehabilitation and retribution. In the process of balancing the above objectives more reliance on one or some at the expense of others cannot be ruled out.

[2] Firstly regarding the crime in this matter, you have been convicted of theft and defeating or obstructing the course of justice. The incident took place at the deceased's business premises "Die Restaurant", in Walvis Bay. On the afternoon of the day in question, you assaulted the deceased to death in self defence, you then dragged and locked the corpse in the store room. You went to the restaurant and took N\$800,00 cash, a cell phone, car keys, locked the premises and threw away the keys. The police had to use a pair of pliers to open the store room in order to remove the body of the deceased. You took the deceased's Hyundai car and drove to Windhoek where on arrival its number plates were removed. You were offering the car for sale at N\$20,000.00 and stickers were accordingly placed on it to that effect.

[3] Secondly the interests of society require that somebody's property must be protected. If observed this practice would encourage working hard so that each person acquires his own property or possessions. This

Court through the resolution of disputes hands down decisions that

immensely contribute towards the maintenance of law and order, see *S v Banda* 1991(2) SA 352 B.

[4] I will now look at your personal circumstances. You opted to testify under oath in your own mitigation of sentence. You are now 24 years old and were 22 years at the time of the commission of this offence. You were born in Walvis Bay where you were brought up by your late grandmother. Your parents are still alive and reside in Windhoek. You went up to grade 10 at Ella du Plessis, but you left school in 2004 to work at Hotel Furstenhof as a barman and waiter. You did this work for seven months. From there you went to Walvis Bay where you worked at the deceased's "Die Restaurant" as well as at Spar in Swakopmund. You were unemployed at the time of the offence. You are not married, and you have one six months old child who stays with your mother. You have no previous convictions. You say you are very sorry and feel bad that the deceased had died as well as for the theft and obstructing the course of justice. Since the death of the deceased you have night mares and do not sleep well. You are therefore asking for forgiveness, you conceded in cross examination that at the time of the offence you were already a mature person exposed to the world in that you worked at different places in various capacities. According to the State counsel you were therefore able to distinguish between right and wrong.

[5] State counsel, Ms. Ndlovu submitted that your conviction on theft, a competent verdict of robbery makes you squarely fall within the provisions of section 14 of the Motor Vehicle Theft Act, Act no. 12 of 1999 as amended. According to her you must therefore be sentenced to 10 years imprisonment as provided in section 15 (1)(ii)(aa) of that Act, seeing that there are no compelling and substantial circumstances that warrants a deviation from that

mandatory sentence. Your counsel, Mr. Wessels, submitted to the contrary saying that section does not apply to you, because you never pleaded to any offence in terms of the Motor Vehicle Theft Act, and neither were you charged in the alternative in terms of it, but you were merely convicted on theft as a competent verdict of robbery.

Section 14 of the Motor Vehicle Theft Act, Act No. 12 of 1999 reads:

"Act applicable in all cases where charge is one of theft of motor vehicle or motor vehicle part, my own underlining

14. The provisions of this Act shall apply in every case where an accused is indicted, summoned or charged in respect of the theft of a motor vehicle or motor vehicle part, notwithstanding the fact that this act is not referred to in the indictment, summons or charge." my own underlining

[6] It is clear from the above that this section only relates to accused persons who have been specifically indicted, summoned, or charged in respect of theft of motor vehicle or motor vehicle part, notwithstanding the fact that the Motor Vehicle Theft Act, Act No. 12 of 1999 is referred to in the said indictment, summons or not charge.

[7] The accused was charged with robbery and after the evidence could not prove that he was convicted of theft of the deceased's property such as a Hyundai Accent motor vehicle with the registration number N1972WB and its ignition key, a cellular telephone, and at least N\$800,00 cash money.

[8] Section 83 of the Criminal Procedure Act, Act No. 51 of 1977 as amended reads:

"83 Charge where it is doubtful what offence committed: -If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of offences."

[9] There is a clear distinction between an offence charged in the alternative and a competent verdict. If the accused is specifically charged in the alternative the existence of such an alternative charge is not dependent on the main count at all. The reason being that even if the main count were to be withdrawn, the alternative would still remain operational.

[10] On the other hand a competent verdict (lesser offence) is dependent on the existence of the charge which has been specifically put to the accused. (See *R v Seboko* 1956(4) SA at page 622 H)

[11] It is therefore my considered view that the provisions of the Motor Vehicle Theft Act does not apply on this matter.

[12] In punishing you I am mindful of the fact that you have only been convicted of 'theft', a lesser offence (competent verdict) on the charge of

robbery. It is also a serious offence, although not like robbery itself.

[13] Had it not been for the swift conduct of one of your friends who immediately alerted the police about the Hyundai car, you would have sold it, you had already placed stickers on it, offering it for sale at N\$20.000,00. This is seen as an aggravating factor. As stated above the car was then recovered, and so was the deceased's cellular telephone. You had already spent the N\$800,00 cash and nothing was recovered.

[14] I cannot overemphasize the need to respect other people's property and to stay away from it. Your sentence will help to prevent you from taking other people's property without their consent. This would also be the message to would be offenders out there.

[15] In the result, you are sentenced as follows:

Theft: Six (6) years' imprisonment;

Defeating the course of Justice: Two (2) years' imprisonment. It is ordered that the sentences be served consecutively.

**SIBOLEKA, J**

**COUNSEL ON BEHALF OF THE STATE:**

**MS. NDLOVU**

**INSTRUCTED BY:**

**THE OFFICE OF THE  
PROSECUTOR-**

**GENERAL**

**COUNSEL ON BEHALF OF ACCUSED:**

**MR. WESSELS**

**INSTRUCTED BY:**

**LEGAL AID**