



**CASE NO.: CR 27/2011**

NOT REPORTABLE

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**KALOLA ILENI**

**HIGH COURT REVIEW CASE NO.: 597/2010**

**CORAM:** HOFF, J *et* UNENGU, AJ

Delivered on: 1 April 2011

---

**REVIEW JUDGMENT**

---

**UNENGU, AJ:** [1] The accused was charged with theft, convicted and sentenced as follows:

“The accused is sentenced to N\$1000.00 (one thousand dollars) or in default of payment to (10) ten months imprisonment. In addition 12 (twelve) months imprisonment wholly suspended for 5 years on the following conditions: (i) that accused is not convicted of theft committed within the period of suspension; (ii) Accused restitutes, Ehafo Stores, Omuthiya c/o Laban Shetunyenga in the sum of N\$1 481.40 through the Clerk of the Court Ondangwa on or before 31.08.2011.”

[2] When the matter was submitted before me on automatic review pursuant to section 302 of the Criminal Procedure Act, 1977 (Act 51 of 1977), I directed the following query to the presiding magistrate:

- “1. Did the learned magistrate ever explain the right to legal representation to her ? If the answer is in the affirmative, where is that explanation recorded on the record of proceedings ?
- 2. The request for restitution by the prosecutor *ex facie* the record of proceedings, was it made on the instructions of the complainant or was it done from the mere submission for sentence ?”

[3] The learned magistrate has duly complied and replied as follows:

“From the record, in particular the annexure on legal representation, I concede that it does not reflect the accused’s choice with respect to legal representation. This is an error on my part and it is sincerely regretted. As such I am of the view that the record of proceedings as it appears is irregular. As for the learned Judge’s second query, I ordered compensation from the mere fact that the prosecutor submitted thus. I also relied on section 297 (1) (a) (i) which I believe gives the sentencing Court discretion in this regard.”

[4] The following proceedings were recorded by the presiding magistrate before he questioned the accused in accordance with the provisions of section 112 (1) (b) of the Act. I quote verbatim.

**“On:           09.02.2011**  
**Before:       .....**  
**PP:           .....**  
**Int:           .....**  
**Accused:     In Person**

[Charge read]

- Q.     Do you understand the charge ?
- A.     Yes.
- Q.     How do you plead ?

## A. Guilty”

[5] (Names of court officials omitted).

After questionings, the learned magistrate indicated that “Court satisfied accd pleads guilty” and returned a verdict of “Guilty as charged”.

[6] From the record, nothing indicating that the accused was informed of her right to legal representation and the entitlement to legal aid at the Legal Aid Directorate in the Ministry of Justice. Similarly, the accused also did not indicate to the court that she wished to conduct her own defence.

[7] In Namibia the duty of judicial officers to inform an unrepresented accused is placed upon them by the Constitution in article 12 (1) (e). It is an irregularity for a presiding officer not to inform an unrepresented accused of his right to legal representation.

See *S v Kau and Others* 1995 NR 1.

[8] Further, it was stated in *S v Kasanga* 2006 (1) NR 348 that in order for an accused to be given a fair trial as envisaged by article 12 of the Namibian Constitution, an accused must be informed at the outset of his right to legal representation and that he can approach the Legal Aid Board for assistance.

(Emphasis added).

[9] I must mention that, in Namibia there is no Legal Aid Board but a Legal Aid Directorate in the Ministry of Justice which is tasked with a duty of providing legal assistance to indigent people who are not in a position to afford legal practitioners of their own.

[10] The learned magistrate conceded that the record does not reflect the accused's choice with regard to legal representation. This is obvious because he never informed the accused of her right to legal representation at the beginning of the trial.

The failure to inform the unrepresented accused of her right to legal representation was an irregularity which led to a failure of justice in the matter. That being the case, the irregularity committed by the magistrate vitiated the proceedings resulting in the accused not having a fair trial. Therefore, the conviction in the matter, in my view, cannot be allowed to stand.

[11] There is still an issue of restitution awarded to complainant as a condition of a suspended sentence, in terms of section 297 (1) (a) (i) of the Criminal Procedure Act above

[12] It is not wrong for a magistrate to order compensation to complainant as a condition of a suspended sentence in terms of section 297 (1) (a) of the Act. However, if the court considers the imposition of such a condition as part of the punishment for a crime committed against another's property, it must, at the very least, conduct an enquiry into the quantum of the loss suffered by the injured party.

*See S v Petrus 2006 (1) NR 118 at 120 C - D*

Maritz, J (as he then was) continued and said the following in the *S v Petrus* case *supra*:

"The presiding officer must therefore inform the accused that the court intends to enquire into the quantum of the loss and advise him or her of the purpose of such enquiry. Any evidence adduced in that regard must, in the absence of a considered admission by the accused of the quantum, be subject to cross-examination by the accused and the accused should also be afforded an opportunity to present evidence in that regard."

(Emphasis added).

[13] In *casu*, such an enquiry was not done. A statement in the following context was put to the accused to comment on:

“Q. The complainant values all the property at N\$1 480.00, what is your comment to this ?

A. He is correct, correct. I cannot dispute it.”

[14] Can this comment by the accused qualify as “a considered admission” as stated in *S v Petrus supra* ?

[15] In my view, not. Even if the comment by the accused, under the circumstances, is regarded as good enough to go through as a considered admission of the loss suffered by complainant, still the magistrate was wrong in awarding restitution in an amount higher than the amount the accused conceded to be the correct value of the items of complainant. The amount conceded by the accused is recorded as N\$1 481.00 whereas the restitution order is for the amount of N\$1 481.40.

[16] Be that as it may. The issue is that the quantum of the loss suffered by a complainant through the commission of a crime/offence against him or her by another must be properly proved before compensation is made in terms of section 300, or as a condition of a suspended sentence in terms of section 297 (1) (a) of the Criminal Procedure Act.

[17] In this matter, due to the failure of the magistrate to explain the accused his right to legal representation and to apply for legal aid, the proceedings, in my view, do not appear to be in accordance with justice.

[18] Consequently, the conviction and sentence are set aside.

It is further ordered, that if the accused has paid the whole N\$1 481.40 or part thereof to the complainant, in compliance of the suspended sentence, that the amount paid, be refunded to the accused on or before 31.08.2011 through the Clerk of the Court of the Ondangwa Magistrate's Court.

UNENGU, AJ

I concur

HOFF, J