



CASE NO.: CR 54/2012

**IN THE HIGH COURT OF NAMIBIA
HELD IN WINDHOEK**

In the matter between:

THE STATE

and

LIYEMISA BEAUTY MUKUZI

(HIGH COURT REVIEW CASE NO.: 1477/2010)

(MAGISTRATE'S SERIAL NO.: 77/2010)

CORAM: PARKER, J et SHIVUTE, J

Delivered on: 2012 June 21

REVIEW JUDGMENT

SHIVUTE, J: [1] The accused person appeared before Katima Mulilo Magistrate's Court and pleaded guilty to a charge of malicious damage to property, read with sections 1 and 21 of the Combating of Domestic Violence Act, (Act 4 of 2003) and he was convicted as such. He was sentenced to a fine of N\$1500.00 (one thousand five hundred Namibia dollars) or in default of payment 6 (six) months imprisonment.

[2] The following query was directed to the learned magistrate.

1. On which grounds was the accused convicted of malicious damage to property, read with sections 1 and 21 of the Combating of Domestic Violence Act, if no questions were asked pertaining to whether there was a domestic relationship between the accused and the complainant?
2. How did the court satisfy itself that the accused had an intention to injure the complainant in his property?

[3] The learned magistrate responded as follows:

"I agree that accused should not have been convicted of malicious damage to property read with sections 1 and 21 of the Combating of Domestic Violence Act because I omitted to establish as to whether there was a domestic relationship or not. I further concede that the accused's intention to injure the complainant in her property was not established as that question was not put to the accused".

[4] Section 112 (1) (b) of the Criminal Procedure Act was designed to protect an accused especially an uneducated and undefended accused from the adverse consequences of an ill-considered plea of guilty (*S v Basson* 1978 (2) SA 51D (C) 512 G). It has also been rightly pointed out that questioning in terms of section 112 (1) (b) can also operate in favour of the accused. The questions and answers must at least cover all the essential elements of the offence which the State in the absence of a plea of guilty would have been required to prove (*S v Mkhize* 1978 (1) SA 264 (N) 267).

[5] In this matter there is no single evidence which indicates that the accused person was in a domestic relationship with the complainant. Therefore the accused could not be said that he violated the Combating of

Domestic Violence Act. Furthermore, the intention to injure the complainant in his property is an essential element of the charge and it was not covered during the application of section 112 (1) (b). I am not satisfied that the charge of malicious damage to property was proved against the accused. I am therefore of the view that the accused was improperly convicted and the conviction cannot be allowed to stand.

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

- (1) The conviction and sentence are set aside.
- (2) It is not necessary to remit the matter to the learned magistrate to enter a plea of not guilty in terms of section 113 of the Act because the accused has already served his sentence.

SHIVUTE, J

I agree.

PARKER, J