



CASE NO.: CR 71/2012

**IN THE HIGH COURT OF NAMIBIA
MAIN DIVISION, HELD AT WINDHOEK**

In the matter between:

THE STATE

and

MUKUVE JACOB

(HIGH COURT REVIEW CASE NO.: 1532/2010)

(MAGISTRATE'S SERIAL NO.: 20/2010)

CORAM: SHIVUTE, J et PARKER, AJ

Delivered on: 2012 August 03

REVIEW JUDGMENT

SHIVUTE, J: [1] The accused was charged in the Mukwe periodical court of the statutory offence of hunting of specially protected game in contravention of section 26 (1), read with sections 1, 26 (3), 85, 87, and 89, of Ordinance 4 of 1975 (as amended) and further read with sections 90 and 250 of Act 51 of 1977.

[2] Particulars of offence are that on 7th day of September 2009 at or near Mahango Game Park in the district of Rundu the said accused did wrongfully

and unlawfully hunt specially protected game to wit: 3x kudu without a permit. He was sentenced to N\$3000.00 (three) thousand Namibia dollars fine or in default of payment 20 (twenty) months' imprisonment.

[3] A query was directed to the learned magistrate as follows:

"The accused is convicted of the offence of hunting specially protected game namely 3x kudu in contravention of section 27 (1) of Ordinance 4 of 1975.

1. *Is the learned magistrate sure that section 27 (1) of Ordinance 4 of 1975 is dealing with hunting of specially protected game?*
2. *In terms of Schedule 3 of Ordinance 4 of 1975 a kudu is not listed as a specially protected game. When did it become a specially protected game? Kindly if there is an amendment to the Ordinance in this regard bring it to the attention of the reviewing judge."*

[4] The learned magistrate replied in the following terms:

1. *"The section 27 (1) of Ordinance 4 of 1975 deals with: when an accused is an accessory after the fact to the commission of the relevant section, thus the section used is definitely wrong and should be hunting of huntable game section 20 (1) (b) of Ordinance 4 of 1975.*
2. *Further a kudu is not listed in terms of schedule 3 of Ordinance 4 of 1975 as a specially protected game, so there is no amendment to the Act and again I agree a kudu is not specially protected game. Thus the accused should have been charged under section 20 (1) (b) of Ordinance 4 of 1975 hunting huntable game. I therefore apply to the honourable justice to amend such conviction to be one of section 20 (1) (b) of Ordinance 4 of 1975 as questioning done shows that the hunting occur in a game Park which is an extra requirement for the*

above section and that the accused had no permit or authority to hunt such kudus."

[5] The accused was charged with hunting of specially protected game, namely kudu in contravention of section 26 (1) of Ordinance 4 of 1975. He was convicted of contravening section 27 (1) of the same Ordinance of hunting specially protected game. Section 27 (1) deals with hunting of protected game. A kudu is neither specially protected game nor a protected game. Therefore the sections under which he was charged and convicted were clearly wrong.

[6] The accused was supposed to be charged with prohibition of hunting in game park in contravention of section 20 (1) read with section 20 (2) (b) as the accused hunted kudu which are huntable game.

[7] Since the accused was charged with and convicted of contravening wrong sections of the applicable statute, the conviction cannot be allowed to stand. It also follows that the sentence imposed is not competent.

[8] In the result the following order is made:

- (1) The conviction of contravening section 27 (1) is set aside and substituted with the conviction of prohibition of hunting in a Game Park in contravention of section 20 (1) and 20 (2) (b) of Ordinance 4 of 1975. The accused admitted all the elements of the offence under section 20 (1) and no prejudice is to be suffered by him.

- (2) The sentence of N\$3,000.00 (three) thousand Namibia dollars fine or 20 (twenty) months' imprisonment is set aside and replaced with a sentence of N\$1,500.00 (One thousand and five hundred) Namibia dollars fine or 12 (twelve) months imprisonment. The sentence is backdated to the date the *court a quo* sentenced the accused.

SHIVUTE, J

I agree.

PARKER, AJ