

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: CA 24/2016

In the matter between:

AMON KALUWA

APPELLANT

vs

THE STATE

RESPONDENT

Neutral citation: *Kaluwa v State* (CA 24-2016) [2016] NAHCMD 259 (09 September 2016)

Coram: SIBOLEKA J and USIKU J

Heard on: 12 August 2016

Delivered on: 09 September 2016

Flynote: Criminal law: Sentence – theft of motor vehicle – penalty regulated by section 15(1)(c)(i) first offender – period of not less than ten years without an option of a fine.

Summary: The appellant and a certain Alexander Cloete stole a blue 2.2 Toyota bakkie at the Single Quarters, after a potential buyer they took there has shown interest in it. The incident was reported to all officers from the Police Radio Control Room. Those who were doing patrol immediately got into action, checking around and found it at Royal Hotel.

Held: The swift police action to recover the stolen vehicle was without any assistance from the appellant.

Held: The sentence is in accord with the penalty provisions.

ORDER

In the result I make the following order:

The sentence of the trial Court is confirmed.

The appeal is dismissed.

APPEAL JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] At the hearing of this appeal, Mr. Ipumbu acted for the appellant and Mr. Kumalo for the respondent.

[2] The appellant appeared in the Regional Court, Windhoek charged with the theft of a motor vehicle read with the provisions of Act 12 of 1999. He pleaded

not guilty and after the trial, he was convicted as charged, and sentenced to: Ten (10) years imprisonment two (2) years of which were suspended on condition that he was not convicted of theft of a motor vehicle in contravention of section 2(a)(i) of Act 12 of 1999, as amended by Act 17 of 2004, committed during the period of suspension. He appeals only against sentence.

[3] The respondent raised a point *in limine* saying the appeal was filed five months out of time. The explanation of the appellant is to the fact that he paid an amount of N\$3 000 to his initial counsel with instructions to proceed with the appeal. He was not aware that the instruction was not carried out, hence the delay in filing the notice of appeal. The court condoned the late filing of the appeal and both counsel proceeded to argue the matter on merits.

[4] The grounds of appeal are as follows:

“If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in paragraph (c), (d) or (e) of subsection 10, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence”.

The trial Court was misdirected, in the alternative, had made contradictory findings as follows:

“Prior to his release on bail accused spent (18) months in custody and as such the Court would consider that in his favour, and this is the only factor found by the Court which can then entitle this court to suspend portion (sic) of the sentence it will impose on accused. Other mitigating circumstances will also be considered. The fact that the court did not find any substantial and compelling circumstances, it does not automatically follow that ordinary mitigating factors must be ignored”.

[5] Here is how the blue 2.2 Toyota bakkie N62346W was recovered after being stolen:

While Stephanus Gonteb and other police officers were doing patrol duties, the Police Radio Control Room announced and informed all officers that a blue 2.2 Toyota bakkie N62346W was stolen at the Single Quarters after a potential buyer they took there to view it, showed an interest in the vehicle. They instantly started driving around and spotted the vehicle at Royal Hotel. An ambush was put in place and two men and a woman came to board it. The officers closed in on them and effected an arrest on Alexander Cloete whom they found behind the steering wheel. He told and directed them to the residence of the appellant who confirmed to the officers that they were together at the time they stole the said vehicle. It is abundantly clear from the above set of fact that it was solely as a result of swift, precise police action that the stolen vehicle was recovered, the appellant arrested and successfully prosecuted for the theft thereof.

[6] It is therefore my considered view that the trial Court correctly stated the law when it ruled that the 18 months the appellant stayed in custody before being released on bail was the only factor entitling it to suspend portion of the sentence imposed on the appellant. The appellant did not assist in anyway towards the recovery of the vehicle.

[7] It is my considered view that the sentence imposed on the appellant is in accord with the penalty provided for in sec. 15(1)(c)(i) of Act 12 of 1999 as amended by Act 17 of 2004.

[8] In the result I make the following order:
The sentence of the trial Court is confirmed.
The appeal is dismissed.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

APPELLANT : Mr. T. Ipumbu
Directorate of Legal Aid

RESPONDENT : Mr. P. S. Kumalo
Office of the Prosecutor-General, Windhoek