

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

CASE NO.: CA 87/2015

In the matter between:

**NDALA ANDREW BENALD
MAHINGI JOSEPH**

**FIRST APPELLANT
SECOND APPELLANT**

And

THE STATE

RESPONDENT

Neutral citation: *Benald v State* (CA 87/2015) [2016] NAHCMD 75 (14 March 2016)

CORAM: SIBOLEKA J AND USIKU J

Heard on: 01 February 2016

Delivered on: 14 March 2016

Flynote: Criminal Procedure – Chapter 29 – Compensation and restitution. The Court convicting the suspect may upon the application of the injured person or of the Prosecutor acting on the instructions of the injured person forthwith award compensation for such damage or loss – taking into account the jurisdictional sentencing requirement for that particular Court. My own underlining.

Summary: The appellants worked for Kariyamasan Association at the time they stole N\$59 000. The funds were from the Ministry of Environment and Tourism intended to mitigate wild animals related crop losses suffered by members.

Held: The complainant did not make an application to the Public Prosecutor for compensation, and neither did the appellants have the means to do so.

Held: Section 300 does not allow the presiding Magistrate, Regional Court Magistrate or Judge to *mero motu* grant an order for compensation.

Held: No misdirection could be found on the part of the sentencing Court.

Held: The appeal cannot be allowed to stand.

ORDER

The appeal against sentence is dismissed.

APPEAL JUDGMENT

SIBOLEKA J, (USIKU J concurring):

[1] At the hearing of the appeal Mr Ngara appeared for the two appellants and Ms Shikerete for the respondent. The court appreciates both counsel's valuable

arguments in this regard.

[2] The appellants were convicted of theft in the amount of N\$59 000 by the Magistrate, Katima Mulilo on 28 July 2015 and sentenced each to: Three (3) years imprisonment of which eighteen (18) months was suspended for five years on condition that the accused is not convicted of theft, committed during the period of suspension.

[3] The appeal is only against sentence and the grounds are as follows:

“AD SENTENCE

1. The learned magistrate erred in that a sentence of 3 years imprisonment of which 18 months is suspended is in respect of theft shockingly inappropriate and startlingly heavier given the circumstances of the case in particular but not limited to the age of the appellant, that the appellant is a first offender, that he pleaded guilty, that he is gainfully employed, that three years have passed from the date the offence was committed, that he has to an extent rehabilitated and is the sole bread winner that has expressed remorse and that he offered to restitute the complainant.
2. The learned magistrate erred in that he attached undue weight to the prevalence of the offence and to the deterrence of the offender and potential offenders at the expense of reformatory sentencing considerations and other factors in favour of the appellant.
3. The learned magistrate erred in that he failed to attach weight to and ignored the fact that the appellant offered to restitute the complainant for his losses and notwithstanding this offer failed to apply his discretion judiciously in considering that he could still order restitution in terms of section 297(a)(i) (aa) of the Criminal Procedure Act, (Act 51 of 1977).
4. The sentence imposed is wholly unfair, heavier and completely unwarranted in the circumstances AND is not consistent with sentences passed for similar offences.”

[4] The appellants' contention is that section 297(i)(aa) of the Criminal Procedure

Act 51 of 1977 empowers the trial Court after convicting an accused to forthwith *mero motu* grant a compensation order. It is this failure by that Court, the appellant finds to be a misdirection that entitles an interference with sentence.

The section reads:

“297. Conditional or unconditional postponement or suspension of sentence, and caution or remand.

- (i) Where a Court convicts a person of any offence other than an offence in respect of which any law prescribes a minimum punishment, the Court may in its discretion –
 - (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned –
- (ii) on one or more conditions, whether as to –
 - (aa) compensation
 - (bb) ...
 - (cc) ...
 - (dd) ...
 - (ee) ... “

[4.1] The above section is only used in instances where the trial Court orders a postponement of the passing of sentence for a period of not exceeding five years. Such a Court is then enjoined to evoke any of the options provided therein of which compensation is one. This section has therefore nothing to do with the granting of an order of compensation to a convicted accused where the trial Court proceeds in the normal flow of events to consider sentence there and then or allows itself a short postponement for that purpose as its own schedule may dictate.

[5] Mr Ngara, counsel for the appellants contends that appellants offered to compensate the complainant but the trial Court ignored that. Here is how he explains the said offer in his address before sentence:

“Accused persons have indicated that given ample time they could be able to

make concerted efforts to compensate. That is not all your worship, the law provides that if these accused person were to fail to compensate then there are remedies still open to this Court to ensure that the said compensation is fulfilled ... whether they have shown that they have got the means or not the words that they are able to try and compositate are coming from the accused themselves."

My own underlining.

From the above it is very clear that at the time of sentencing, the appellants had no means and were not able to compensate the complainant. The Public Prosecutor correctly stated that in his view an order for compensation will not serve much purpose.

[6] Compensation is covered in chapter 29 section 300 of the Criminal Procedure Act 51 of 1977 as amended which states the following:

"Compensation and Restitution

300 Court may award compensation where offence causes damage to or loss of property. –

(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person; The Court in question may upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: provided that –

(a) a regional Court or a Magistrate's Court shall not make any such award if the compensation applied for exceeds ... respectively."

[7] It is my considered view that the trial Court properly applied its mind during the sentencing process. It took the appellants' personal circumstances, the interests of society and the crime itself in arriving at that sentence. The appellants argument that the sentence is shockingly inappropriate and startlingly severe is not correct.

[8] The appeal can therefore not be allowed to stand.

[9] In the result the appeal is dismissed.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

1ST AND 2ND APPELLANTS : Mr. H Ngara
Instructed by Directorate of Legal Aid

RESPONDENT : Ms. F Shikerete
Office of the Prosecutor-General, Windhoek