

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 18/2017

In the matter between

THE STATE

and

KAMININA NYAU

HIGH COURT MD REVIEW CASE NO 1644

Neutral citation: S v Nyau (CR 18/2017) [2017] NAHCMD 42 (21 February 2017)

CORAM: NDAUENDAPO J et LIEBENBERG J

DELIVERED: 21 February 2017

Flynote: Criminal Procedure – Plea – Conviction in terms of s 112(1)(a) – Section provides for the imposition of a fine only.

ORDER

1. The conviction is confirmed.
2. The sentence is set aside and the accused is sentenced to N\$1 500 or 50 days imprisonment, wholly suspended for three years on condition that the accused is not convicted of theft, committed during the period of suspension.
3. The sentence is antedated to 15.09.2016.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] This is yet another example of cases where this court is required to write judgments on the same mistakes repeatedly made by magistrates who seem to make no effort to read the judgments delivered in this court, or at least make an effort to familiarise themselves with the very basic principles applicable to s 112(1)(a) of the Criminal Procedure Act 51 of 1977. Firstly, this section provides for the expeditious finalisation of *petty or minor offences* and should not merely be invoked in order to

finalise the matter without having to question the accused. Secondly, virtually in every instance the prosecutor in aggravation of sentence submits how serious the offence is that is up for sentence, while the court will echo the same sentiments in its reasons on sentence. If the offence is so serious as made out to be, and where a custodial sentence in the circumstances of the case will be just, then the court should in the first place not have convicted in terms of s 112(1)(a). To use the section contrary to what the Legislature intended, will undoubtedly lead to a travesty of justice in that there is no protection for the lay accused.

[2] The accused was convicted in terms of s 112(1)(a) of theft and sentenced to 3 months' imprisonment, wholly suspended for a period of 3 years on condition of good conduct and further, to undergo community service as set out in the order. Whereas the community service had to be completed within two months after the date of sentence (15.09.2016), this judgment is purely academic. Be that as it may, the sentence imposed is improper and must be set aside. To revert the matter to the presiding magistrate in order to sentence afresh will be unfair to the accused who has already completed the community service imposed on him.

[3] The accused had stolen goods from Shoprite to the value of N\$257.38. At the time of sentence he was 34 years of age, unemployed with three minor children in his care. He asked the court to give him a suspended sentence. In the circumstances it appears to me proper to only substitute the term of 3 months' imprisonment with an appropriate fine, which, if he were to reoffend and be convicted within the period of suspension, he would still have the opportunity to pay a fine instead of being incarcerated.

[4] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is set aside and the accused is sentenced to N\$1 500 or 50 days imprisonment, wholly suspended for three years on condition that the accused is not convicted of theft, committed during the period of suspension.
3. The sentence is antedated to 15.09.2016.

J C LIEBENBERG

JUDGE

N NDAUENDAPO

JUDGE