

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 26/2019

In the matter between:

THE STATE

V

WALLICE DE VILIERIS

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 568/2019)

Neutral citation: *S v De Viliers* (CR 26/2019) [2019] NAHCMD 72 (28 March 2019)

Coram: USIKU J and UNENGU AJ

Delivered: 28 March 2019

Flynote: Criminal Procedure – Plea of guilty – Section 112 (1)(a) – Magistrate making a compensation order – Section 300 – No application made by the injured person – Neither the prosecutor having been instructed to apply for such compensation by the injured party – Such order not competent in law.

Summary: The accused appeared before the Magistrate Court Okahandja on a charge of malicious damage to property. He pleaded guilty to the charge and the matter was finalised in terms of section 112 (1)(a) whereafter the accused was sentenced as hereunder:

‘12 Months imprisonment of which 12 months imprisonment suspended for five years on the following conditions. That the accused is not convicted of malicious damage to property, committed during the period of suspension’

ORDER

1. The sentence imposed by the learned magistrate is clearly not in accordance with justice and is hereby set aside.
2. The matter is remitted to the Magistrate’s Court Okahandja before the same magistrate to sentence the accused afresh and should the magistrate not be available, another magistrate can deal with the matter further in accordance with the law.

REVIEW JUDGMENT

USIKU J, (UNENGU AJ concurring)

[1] The accused appeared before the Magistrate Court, Okahandja on a charge of malicious damage to property. He tendered a guilty plea in terms of section 112 (1) a whereafter the matter was finalised. The matter was submitted before me for review in terms of section 304 of the Criminal Procedure Act, Act 51 of 1977 as amended by Magistrate K R Swarts with a covering letter which read as follows:

1. This is a matter that proceeded before my colleague learned Magistrate Kwizi, on the 01/02/2018, he convicted the accused person under section 112 (1) a of Act 51 of 1977 for the damage of a television valued at N\$3500.
2. Magistrate Kwizi sentenced the accused person to “Twelve (12) months imprisonment wholly suspended for five (5) years, on condition that the accused compensate the complainant in the amount of three thousand (\$N3500) in terms of section 300 of the Criminal Procedure Act, and the money is payable with the clerk of court at the Okahandja Magistrate’s Court on or before 28 June 2018.”
3. This matter was never send on review, perhaps maybe because compensation was given, because learned Magistrate Kwize also indicated that the matter is not reviewable, which is clear from the face of the record.
4. I have learned about these proceedings today, hence the reason I am sending this proceedings on review, because I think the proceedings and the sentence is not in accordance with the law.
5. The first problem in my view, is the application that was brought by the prosecutor, for an compensation in terms of section 300, that application is not in accordance with the said section, because the application was not brought by the injured person nor did the prosecutor act on instructions of the injured person, in matters such as S v Polman 1973 (3) SA 21 (c) and S v Du Plessis 1969 (1) SA 578 (O), it was held that: **“When a prosecutor brings the application, it must be clear that he is acting on the instructions of the injured person.”** In the instant matter that is not the case, the prosecutor suggested a sentence to be imposed on conditions in terms of section 300, and in my view that was not an application as provided for in terms of section 300,

but merely an suggestion, as the prosecutor did not indicate to Court that she is acting on instructions of the complainant, no name of the complainant, No ID number of the complainant provided for example.

6. It appears from the record, that the learned magistrate granted that suggestion and gave the compensation without, the name of the complainant, no ID number, who should come and collect the money from the clerk of Court? It is just not clear.
7. The further problem lies in the sentencing itself, the sentence does not make any sense at all, this is not an competent sentence nor effective in my perspective, because what should happen to the accused person if he commits a similar offence or if he decides not to pay the compensation that was ordered by the magistrate, furthermore, the learned magistrate failed to explain the review and appeal rights to the accused person after the purported sentence was passed which is a requirement.
8. I therefore send this record for the reviewing judges and also perhaps guide me as well. I have discussed this matter with my Divisional Magistrate Mr Beukes and he also advised me to send this record on review.

[2] I am of the view that the concessions made by the magistrate are correctly made. Section 300 of the Criminal Procedure Act specifically provides ..."upon application of the injured person or the prosecutor acting on instructions of the injured person, forthwith award the injured person compensation for such damage."

[3] As correctly pointed out, there appear to be no such application having been made by the injured person expect a suggestion by the accused himself to buy the complainant another television set.

[4] Furthermore, section 112 (1)(a) does not allow the magistrate to impose a sentence of imprisonment without an option of a fine. In the light of the above the sentence imposed by the learned magistrate is clearly not in accordance with justice and is hereby set aside.

[5] The matter is remitted to the Magistrate's Court Okahandja before the same magistrate to sentence the accused afresh and should the magistrate not be available, another magistrate can deal with the matter further in accordance with the law.

D N USIKU
Judge

E P Unengu
Acting Judge