

REPUBLIC OF NAMIBIA

NON REPORTABLE

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION JUDGMENT
Case no: CA 30/2012

In the matter between:

KAMBAMBI MUSUTUA

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Musutua v The state (CA 30/2012) NAHCNLD 61* (03 December 2013)

Coram: TOMMASI, J et MILLER, AJ

Heard: 03 December 2013 **Delivered:** 03 December 2013

Summary: Criminal procedure - Sentence - Convicted of theft of stock of more than N\$ 98 200 in value - Court to exercise discretion in determining the appropriate sentence - Minimum sentence of 20 years declared unconstitutional - Value of the stock to be taken into consideration - A sentence of 6 years not shockingly improper -

Appeal court not to interfere with the decision of the trial court absent any misdirection or
irregularity

ORDER

The appeal is dismissed.

JUDGMENT

MILLER AJ (Tommasi concurring):

[1] The Appellant initially appeared before the Magistrate at Opuwo. He was charged with and pleaded guilty to a charge of theft read with the provisions of the Stock Theft Act 12 of 1990 as amended. When questioned by the Magistrate the accused admitted that he stole 11 head of cattle valued at N\$ 98 200 which belong to one Remoisi Razor Pumbu. He admitted that he stole the cattle in order for him to sell some of them. The Magistrate correctly concluded that the appellant admitted all the necessary allegations necessary in order to sustain the charge and accordingly found the appellant guilty. The matter was then transferred to the Regional Court for sentence. As matters turned out, the Regional Magistrate imposed the following sentence: 20 years' imprisonment of which 10 years imprisonment are suspended for 5 years on condition that the accused is not convicted of stock theft read with Act 12 of 1990 committed during the period of suspension.

[2] That sentence was subsequently set aside by this court and the matter was remitted to the Regional Magistrate to consider the sentence afresh. Having heard the appellant once more in mitigation the Regional Magistrate concluded that the following factors constituted compelling and substantial circumstances which warranted the imposition of a lesser sentence and a prescribed minimum sentence. In so far as it is

relevant for the purposes of this appeal I need only state that the prescribed minimum sentences enacted were subsequently declared unconstitutional and set aside by the High Court in *Daniel v Attorney-General and others*; *Peter v Attorney-General and others*. The factors taken into account by the Honourable Magistrate were the fact firstly, that the appellant pleaded guilty. Secondly, that the cattle stolen or at least some of them were recovered and thirdly, that the prescribed sentence is disproportionate to the value of the cattle stolen. The Regional Magistrate thereupon imposed a sentence of six years imprisonment.

[3] The appellant thereupon filed a Notice of Appeal which is now before us. In that Notice the appellant states that his trial was unfair because he was not afforded legal representation at his trial which was to his disadvantage. There is no merit in that ground of appeal. When the appellant appeared initially before the Magistrate at Opuwo his right to legal representation was fully explained to him, whereupon the appellant chose to conduct his case in person. These rights were again explained to him when he appeared before the Regional Magistrate. The appellant once more chose to conduct his case in person. In these circumstances the appellant cannot now complain about the fact that he was not legally represented.

[4] As far as the sentence imposed is concerned the appellant advances as the only ground of substance in his Notice of Appeal which he repeated before us this morning that the learned Regional Magistrate did not take into account that, when the sentence of six years imprisonment was imposed, the appellant by then had already been in custody for approximately two years. The regional Magistrate in his reasons for sentence stated that he did take that fact into consideration and I have no reason to question that. Moreover the sentence imposed by the Regional Magistrate appears to be most appropriate given the circumstances of the case. It does not in the least induce a sense of shock and is the type of sentence which I would have imposed had I sat as the court of first instance.

[5] I find no reason to interfere with the sentence, which is a matter primarily one for the discretion of the trial court, given the fact that the powers of this court to interfere as a court of appeal are limited, absent any misdirection or irregularity. I conclude that the appeal must fail. The appeal is as a consequence dismissed.

PJ

Miller

Acting

Tommasi

Judge

APPEARANCE

APPELLANT

IN PERSON

RESPONDENT
OF

SHILEKA
PROSECUTOR GENERAL, OSHAKATI