

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
REVIEW JUDGMENT

Case no: CR 3/2018

THE STATE

v

PAULUS KANYEMBA

ACCUSED

(High Court Case no. 313/2015)

Neutral citation: *S v Kanyemba* (CR 3/2018) [2018] NAHCNLD 3 (25 January 2018)

Coram: TOMMASI J *et* JANUARY

Delivered: 25 January 2018

Flynote: Sentence — Minimum sentences — Stock Theft Act – Penalty clause prescribes minimum sentence of not less than two years – A fine not a competent sentence – court on review may alter sentence to accord with the requirements of justice (See *S v Arebeb* 1997 NR 1 (HC)).

ORDER

1. The conviction is confirmed;
2. The sentence is set aside and altered to the following sentence:

The accused is sentenced to 1 year imprisonment wholly suspended for 5 years on condition that the accused is not convicted of stock theft committed during the period of suspension.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This matter came before me on automatic review.

[2] The accused was convicted of having stolen a female goat valued at N\$250 in contravention of section 11(1)(a) of the Stock Theft Act, 1990 (Act 12 of 1990) as amended. He was sentenced to pay a fine of N\$1000 or in default of payment, 6 months' imprisonment. The conviction is in order and may be confirmed. The sentence however is not in accordance with justice and stands to be set aside.

[3] Section 14(1)(a)(i) of the Act, provides as follow:

'(1) Any person who is convicted of an offence referred to in section 11(1)(a), (b), (c) or (d) that relates to stock other than poultry-

(a) of which the value-

(i) is less than N\$500, shall be liable in the case of a first conviction, to imprisonment for a period not less than two years without the option of a fine;'

The court may however, if satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed, impose such lesser sentence.

[4] The magistrate conceded that the court was not entitled to impose a fine. The concession was correctly made. The sentence imposed is an incompetent sentence and this court may thus alter the sentence to accord with the requirements of justice (See *S v Arebeb* 1997 NR 1 (HC)). The learned magistrate furthermore indicated in his statement in response to this court's query that the accused had in fact served the six months' imprisonment imposed as the alternative to the fine.

[5] The accused, an elderly man, was unable to state his true age. He is a first offender. He informed the court that he has a wife and 4 children and that he survives by cultivating for people. He was detained in custody for almost a year when he was released on warning. He absconded and was brought to court after two years and 6 months. A summary inquiry was held to determine his reasons for failing to comply with the warning. He was fined N\$100 or 30 days imprisonment. He was thereafter detained in custody until he was sentenced. The latter period was approximately two years and three months.

[6] The seriousness of the matter cannot be ignored. The legislature set a standard of not less than two years' imprisonment for theft of stock valued less than N\$500. In this instance the value of the goat was N\$250 and it belonged to a subsistence farmer.

[7] The court however must weigh the aggravating circumstances and the mitigating circumstances and determine whether there are substantial and compelling circumstances. The mitigating factors on record, cumulatively, amount to substantial and compelling circumstances. The court, having concluded thus, may impose a lesser sentence. This court furthermore must have regard to the term of imprisonment the accused already served.

[8] In the result the following order is made:

1. The conviction is confirmed;
2. The sentenced is set aside and altered to the following sentence:

The accused is sentence to 1 year imprisonment wholly suspended for 5 years on condition that the accused is not convicted of stock theft committed during the period of suspension.

MA TOMMASI J

Judge

I agree,

HC JANUARY

Judge