

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

**APPEAL JUDGMENT**

Case No: HC-NLD-CRI-APP-CAL-2018/00049

In the matter between:

**NDESHIKEYA MICHAEL**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Michael v S* (HC-NLD-CRI-APP-CAL-2018/00049) [2019] NAHCNLD 24 (28 February 2019)

**Coram:** TOMMASI J and JANUARY J

**Heard:** 24 January 2019

**Delivered:** 28 February 2019

**Flynote:** Criminal Procedure – Appeal – Sentence – 2 Charges of Stock Theft – 13 Goats and 1 donkey – 5 years imprisonment and 2 years imprisonment respectively –

Condonation – Reasons for the delay not reasonable – No prospects of success on appeal – Matter struck from the roll.

**Summary:** The appellant appeals against sentence. He is sentenced to 5 years imprisonment for theft of 13 goats to the value of N\$6500 and 2 years' imprisonment for theft of a donkey to the value of N\$700 respectively. He filed his notice of appeal out of time. He filed an application for condonation and advanced reasons for the delay. This court considered the merits to determine if the appellant has any prospect of success on appeal. There are no prospects of success on appeal. The matter is accordingly struck from the roll.

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### ORDER

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1. I find that there are no prospects of success on appeal.
  2. The appeal is struck from the roll and considered finalized.
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### APPEAL JUDGMENT

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**JANUARY J** (TOMMASI J concurring):

[1] The appellant in this matter was duly convicted in the magistrate's court on 2 charges of theft taking into consideration the provision of section 11(1)(a), 1, 14 and 17 of the Stock Theft Act, Act 12 of 1990. The accused stole 13 (thirteen goats) valued at N\$6500 and 1 (one) donkey valued N\$700 respectively.

[2] The appeal is against the sentences. The appellant appeared in person and the respondent is represented by Ms Nghiyoonanye.

[3] The appellant filed his notice of appeal about 6 months late. He applied for condonation and advanced the reason for the delay that he could not find a competent person in prison to assist him in drafting the necessary documents. He further alleges

that he was not informed of his right to appeal by the magistrate. The record however reflects that the appellant was indeed informed of his rights to both a review and appeal. He understood the explanation. I find his explanation for the delay not to be reasonable.

[4] Ms Nghiyonyanye raised points *in limine* that there is no satisfactory explanation for the delay, that there are no prospects of success on appeal and that the appellant's notice of appeal does not disclose proper grounds of appeal.

[5] In his initial notice of appeal, the appellant prayed for a reduction in sentence repeating what he already stated in mitigation in the court *a quo*; that he is the only breadwinner, taking care of his house, crops and animals and that in relation to the theft of the donkey the complainant indicated that he wanted to withdraw the charge. The appellant in the meantime filed heads of argument. He again prayed for a reduction of sentence repeating that his 11 children, animals, crops and house are without a caretaker. He further states that the learned magistrate erred in not considering that he is a first offender, 49 years of age and has 11 children.

[6] The record reflects that the learned magistrate assisted the appellant in mitigation by asking questions to consider the personal circumstances of the appellant. The aspects that the appellant raised in this appeal were all properly considered.

[7] I have considered the respective sentences to determine if they are shockingly or startlingly inappropriate or ones that this court would not have imposed had it sat as a court of first instance. It is trite that sentencing is primarily a discretion of the presiding officer. It is only in limited instances that a court of appeal will interfere with that discretion. I do not find any of those instances in this appeal.

[8] I do not find any misdirection or irregularity in relation to the sentences. Accordingly I find that there are no prospects of success on appeal. The matter therefore stands to be struck from the roll.

[9] In the result:

1. I find that there are no prospects of success on appeal.
2. The appeal is struck from the roll and considered finalized.

**JUDGE**

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**H C JANUARY**

I agree

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**M A TOMMASI**

**JUDGE**

Appearances:

For the Appellant:

Ms C Tjihero

Of Dr. Weder, Kauta & Hoveka Inc.Oshakati

For the Respondent:

Ms M Nghiyoonanye

Of Office of the Prosecutor-General, Oshakati